DOCKET NO. FST-CV15-5014808-S	)	SUPERIOR COURT
	)	
WILLIAM A. LOMAS	)	JUDICIAL DISTRICT OF
	)	STAMFORD/NORWALK
Plaintiff,	)	
	)	
v.	)	AT STAMFORD
	)	
PARTNER WEALTH MANAGEMENT, LLC, KEVIN G. BURNS, JAMES PRATT-HEANEY, WILLIAM P. LOFTUS	)	
	)	OCTOBER 13, 2016
Defendants.		

REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR APPOINTMENT OF COMMISSION AND FOR LEAVE TO TAKE DEPOSITION IN NEW YORK OF DAVID LAGASSE, ESQ.

I. INTRODUCTION

Plaintiff William A. Lomas ("Lomas") submits this Reply Memorandum in further support of his Motion for Appointment of Commission and for Leave to Take Deposition in New York of David Lagasse, Esq. ("Attorney Lagasse") (Dkt. No. 183.00). Lomas' motion should be granted because:

- The attorney-client privilege does not prevent Lomas from securing evidence related to communications between defendant, Partner Wealth Management, LLC ("PWM"), and its lawyer during the period that Lomas was an owner and member of PWM. These communications, some of which Lomas was a party to, are material to the issues in this case and Lomas is entitled to develop that evidence in order to present his claims at trial.[1]

[1] At page 2 of Defendants/Counterclaim Plaintiffs' Opposition to Lomas' Motion for the Appointment of a Commission and For Leave to Take the Deposition in New York of David Lagasse, Esq. (Dkt. No. 190.00), Defendants attempt to belittle Lomas' claims. The merits of

- To the extent the attorney-client privilege would have prevented the sought-after discovery, it has been waived through several communications between Attorney Lagasse and Lomas concerning the subject matter of Attorney Lagasse's representation of PWM and through defendants' selective disclosure of communications related to that representation.
- Defendants have not identified any prior discovery that would be unnecessarily duplicated by a deposition of Attorney Lagasse.
- A deposition of Attorney Lagasse will affect neither the trial date nor the ability of the parties to prepare for trial. As set forth in the recently filed Joint Motion for Continuance of Trial, Status Conference, and entry of Scheduling Order (Dkt. No. 191.00) the pleadings are not closed, considerable discovery remains (including disclosures and discovery of expert witnesses) and the case is not trial ready.

II. RELEVANT FACTUAL BACKGROUND

Lomas was a founder and 25% member of PWM until his withdrawal, noticed on October 13, 2014, became effective on January 14, 2015. Amended Complaint ("AC") at ¶ 1. Following his withdrawal Lomas was entitled to a payout of $4,159,791.25, representing his 25% interest in PWM, plus interest at 6% if the remaining three members (the individual defendants) decided to pay their obligation over time. AC at ¶¶ 23, 24, 28. But following

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Lomas' claims will be determined at trial. In the meantime it is sufficient for the Court to know that Defendants elected to stipulate to a prejudgment remedy on those claims – including substantial payments directly to Lomas – rather than contest them at an evidentiary hearing.

Lomas' notice of withdrawal the individual defendants took steps specifically designed to avoid their obligations to him and to deprive him of his payout. AC at ¶ 33.

The story of what happened is told by defendants themselves. E-mails between defendant Burns, PWM's Chief Financial Officer, Jeff Fuhrman ("Fuhrman"), and the other individual defendants reveal a carefully developed "strategy" to avoid and negate the payout required under the terms of the Partner Wealth Management LLC Limited Liability Company Agreement dated November 30, 2009 (the "2009 Agreement"). AC at ¶ 34.

In an email on October 19, 2014, Fuhrman tried to keep the defendants honest. He wrote:

> The options on Lomas are as follows:
>
> 1) As per the Partnership Agreement, pay him the estimated $4.25MM plus interest over five years with the first installment coming in around next June.
>
> 2) Pay a reduced amount in a lump-sum in January with the interest going to either a bank or Focus and not Lomas.
>
> * * *
>
> 3) Attempt to negotiate a lower price by fighting him on the terms of the Agreement. Never mind that there is virtually no legal basis for such a position, this will make the transition of clients/cash flow all the more challenging.
>
> * * *
>
> By fighting your partner/adversary on a standing six-year agreement you're also creating an incredible moral hazard. Specifically, why would anyone buy into a partnership that has the potential to be renegotiated every time it doesn't suit your personal interest?
>
> This is simple.

AC at ¶ 35. When defendant Burns engaged in revisionism, claiming that changes he proposed to negate the payout were previously agreed to, Fuhrman corrected him:

> The frustration with the Partnership Agreement was with the current compensation. We fixed that. Hard to argue Bill would have agreed to adversely impact his valuation. If all you needed

> was three of the four partners to agree to make such a change, then why did it have to wait until the eve of his sale to do so?

AC at ¶¶ 36-37.

But motivated by greed, Burns and the other defendants plowed ahead with their plan. On November 21, 2014, Burns wrote:

> I simply can't take on 4 million plus in debt and continue to make significantly less than I would at any brokerage firm. I don't have grandchildren and a happy home so I don't have the luxury of family vacations and trips and time off which is my choice. I plan on killing it the next five years and continuing this break neck pace to get rich. I won't be able to if I do this deal.

The next day, Loftus wrote:

> The issue.... And none of us realized this at the time ... Is that we have to buy Bill out with after tax dollars. Believe me, I've worked the math out., [sic] the deal that he's looking for (I acknowledge that we have a contract and I really want to honor it ALTHOUGH to be fair it was done at the 11 Th hour)) is a bad one for all of us.

AC at ¶ 39. Thus, Defendants put their self-interests ahead of their contractual and fiduciary obligation to their fellow founding member. And they used the "amendment" provision in the 2009 Agreement as a pretext to do so.

Despite what their e-mails reveal, defendants claim in this litigation that:

- The valuation provision of the 2009 Agreement was never intended to repurchase the interests of a founding member;
- The valuation provision in the 2009 Agreement was unworkable;
- The need to change valuation was long known; and

- The decision to change valuation was agreed upon long before Lomas' resignation.

Attorney Lagasse was retained by the members of PWM in December 2013. His charge was to "represent Partner Wealth Management in connection with developing a partnership compensation plan[2] and other, future matters that you may request and which we agree to accept." *See* Engagement Letter attached as Exh. A. It is clear that Attorney Lagasse prepared changes to the compensation plan at PWM, and that the 2009 Agreement was amended to reflect these changes as of May 1, 2014. It is also clear that on December 18, 2014, more than two months after Lomas tendered his resignation, Attorney Lagasse met with the members, including Lomas, to present further changes to the 2009 Agreement, including changes to how a member's equity would be valued. But what happened between the May 1 amendment and the December 18 meeting is unclear and disputed. Further, it is unclear (i) why Attorney Lagasse was asked to do further work related to member's equity, (ii) when he was asked to do it, and (iii) what he was told about the circumstances. These questions go to the very heart of defendants' position in this lawsuit. It is absolutely disputed by Lomas that Attorney Lagasse's work was previously agreed to and planned by the members, as they now claim. Attorney Lagasse has relevant evidence regarding these questions. Lomas, who was included in at least some of the discussions with Attorney Lagasse, is entitled to uncover, understand and present this evidence.

Lomas now seeks to depose Attorney Lagasse to discover, *inter alia,* relevant information concerning the following:

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[2] Compensation was intended to pay the members for their contributions as employees of PWM during the course of the year. This is distinct from valuation of equity, which is a measure of their percentage interests as member/owners of PWM.

- His understanding of the scope of services he was to provide and when and how that scope changed or expanded
- When he was first asked to consider member's equity and changes to how it would be valued
- When he was first directed to prepare an amended limited liability company agreement reflecting a change in how a member's equity would be valued
- Who directed him and his understanding as to why
- What he was told about the need for him to do the work and whether there was any urgency
- The number of conversations and meetings he had with the members of PWM
- What occurred at the December 18, 2014 meeting and thereafter resulting in a new limited liability company agreement effective January 1, 2015 (the "2015 Agreement")

None of the foregoing information is immunized from discovery by Lomas. Lomas was a member and owner of Attorney Lagasse's client. To the extent the work performed by Attorney Lagasse was for the benefit of PWM it was for the purported benefit of PWM's members, including Lomas. Defendants cannot have it both ways – they cannot claim that Lomas was a member right up until the effective date of his resignation on January 14, 2015 and at the same time claim that information concerning Attorney Lagasse's representation of PWM during that period is unavailable to Lomas because it is privileged.

III. ARGUMENT

A. The Information Sought By Lomas Is Highly Relevant and Not Immunized From Discovery By Him.

By seeking to depose Attorney Lagasse, Lomas is not infringing upon Defendant's attorney-client privilege because Lomas was a member of the client in the attorney-client relationship. Further, Lomas seeks primarily to discover facts concerning what Attorney Lagasse was asked to do and when he was asked to do it, not what advice he gave.

The attorney-client privilege protects the confidential giving of professional advice by an attorney acting in the capacity of legal advisor to those who can act on it. *PSE Consulting v. Frank Mercede and Sons, Inc.*, 267 Conn. 279, 329 (2004). While the existence of the privilege encourages the candor that is necessary for effective legal advice, the exercise of the privilege tends to prevent a full disclosure of the truth in court. *Id.* at 330. For this reason, the privilege is strictly construed. *Id.* It is also for this reason that not every communication between client and attorney is protected by the attorney-client privilege. *Id.* "A communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it was shown to be inextricably linked to the giving of legal advice." *Id.; see also Carrier Corp. v. Home Ins. Co.*, No. 35 23 83, 1992 WL 139778, at *4 (Conn. Super. Ct. Jun. 12, 1992) ("the attorney-client privilege does not protect documents or communications that can be characterized as conveying purely technical or business information, nor does the privilege protect against the disclosure of the facts communicated.").[3] Defendants bear the burden of proving each element of the privilege, a bar which they have not met.

[3] All unreported decisions are attached as Exhibit B in the order they are cited.

Lomas seeks to depose Attorney Lagasse to obtain factual information regarding the amendment to the 2009 Agreement. Such information includes when Attorney Lagasse was first retained by defendants for the purpose of drafting the amendment; the scope of his retention; what occurred at the meeting held on December 18, 2014 where Lomas was present, including his recollection of any statements made by defendants or Lomas; the content of the notes he took during that meeting; his knowledge as to whether the amendment to the Agreement would materially alter and/or limit the buyout obligation owed to Lomas; and other facts surrounding his involvement in the amendment that are relevant to Lomas' claims and defenses and which are reasonably calculated to the lead to the discovery of admissible evidence.

Lomas is "the client" in the attorney-client relationship claimed by defendants. As a member of PWM, he is entitled to production of information and documents that he would have had access to during his tenure at PWM and which were originally created during his time as a member and officer of PWM. Defendants argue that "Courts routinely hold that the attorney-client privilege belongs to the limited liability corporation, not to minority members and certainly not to former members such as Plaintiff." *See* p. 6. But they fail to acknowledge a very strong line of cases, including a Connecticut case, that embrace the joint client exception for corporations and hold that a party, like Lomas, is entitled to otherwise privileged documents. *See Harris v. Wells*, B-89-391 (WWE), B-89-482 (WWE), 1990 WL 150445, at *3-4 (D. Conn. 1990) (holding that because the corporation's directors were entrusted with the responsibility of managing the corporation, they hold the attorney-client privilege and therefore cannot assert the privilege against each other); *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992) (former director and CEO who sued the corporation, had the right to access documents withheld on the

basis of the attorney-client privilege that had been created while he was a director and officer at the corporation because he was "squarely within the class of persons who could receive communications" from the corporation's counsel); *Kirby v. Kirby*, 1987 WL 14862, at *7 (Del. Ch. 1987) (holding that directors of a closely held corporation, collectively, were the client and that joint clients may not assert the attorney-client privilege against one another); *Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 473-74 (W.D. Mich. 1997) (directors have a right to access attorney communications relating to the time that they served as directors); *Inter-Fluve v. Montana Eighteenth Judicial Dist. Court*, 327 Mont. 14, 112 P.3d 258, 264 (2005) (closely-held corporation and directors were joint clients because a corporation can act only through its agent; therefore the corporation cannot assert the attorney-client privilege against its joint client directors); *Rush v. Sunrise Sr. Living, Inc.*, 2008 WL 1926766, No. CL-07-1132, at p. 4 (Va. Cir. Ct. 2008) ("find[ing] that the public policy of furthering [the corporation's] full and frank communication with its in-house and outside counsel [was] outweighed by [plaintiff's] right of access to documents which he received or reviewed, authored or reasonably had access to as CFO during his tenure" because "a narrow application of the attorney-client privilege is required by law…").

The attorney-client privilege does not prevent a deposition of Attorney Lagasse. Lomas is not a third-party attempting to pierce the attorney-client veil. He was a member/owner of the client and, thus, a joint client who was part of that relationship. This is evidenced by his participation in a meeting and communications with Attorney Lagasse concerning the subject matter that is in dispute in this lawsuit. Three (3) emails concerning the subject matter of this dispute are attached as Exhibit C. They confirm that Lomas was involved in attorney-client

communications as a client under the joint client exception to the attorney-client privilege. In fact, in one of those e-mails, defendant Loftus specifically ensured that Lomas received Attorney Lagasse's contact information so that Lomas could communicate directly with Attorney Lagasse. *See* Exhibit C, PWM_0001921. Further, there is no dispute that Lomas was at the December 18, 2014 meeting where Attorney Lagasse first presented a draft of the 2015 Agreement to the members for their consideration. Thus, Lomas was within the class of individuals intended to benefit from Attorney Lagasse's representation. Far from excluding him, the attorney-client privilege actually includes him. For this reason alone, Lomas' motion should be granted.

B. Even If The Privilege Excludes Lomas, It Has Now Been Waived by Defendants' Selective Production Of Communications With Attorney Lagasse.

Assuming, *arguendo*, that the attorney-client privilege and/or work product doctrine applies to the information Lomas seeks, courts routinely hold that voluntary disclosure of once-privileged communications constitutes a waiver of the privilege. "Because the attorney-client privilege inhibits the truth-finding process, it has been narrowly construed... and courts have been vigilant to prevent litigants from converting the privilege into a tool for selective disclosure." *Kowalonek v. Bryant Lane, Inc.*, No. CV-96-0324942-S, 2000 WL 486961, at *5 (Conn. Super. Ct. April 11, 2000) (internal citations omitted).

Defendants should not be permitted to cherry-pick among the relevant communications, waiving the privilege for some and asserting it for others. Nor should they be permitted to invoke the privilege where confidentiality has already been compromised for their own benefit. "A client cannot waive the privilege in circumstances where disclosure might be beneficial while

maintaining it in other circumstances where nondisclosure would be beneficial." *Id.* (internal citations omitted).

Here, Defendants have chosen to produce at least five (5) e-mails constituting communications between Attorney Lagasse and Defendants related to Lomas and the 2009 Amendment. *See* emails attached at Exhibit D. They include communications between defendants and counsel that Lomas was not privy to during his tenure at PWM, and even include an email between Attorney Lagasse and Jeff Fuhrman dated July 17, 2015 – ***after*** Lomas commenced this litigation. By producing a random subset of emails during the period Attorney Lagasse was retained to draft and execute the amendment to the 2009 Agreement, Defendants have revealed only a portion of the story – presumably, the portion that is most beneficial to them. Lomas is entitled to inquire about the whole story – including the parts which may benefit him and/or refute Defendants' recent narrative.

Accordingly, this Court should grant Lomas' request to depose Attorney Lagasse to enable a full and fair opportunity to discover the facts surrounding the amendment to the 2009 Agreement. Any other result would be manifestly unfair and unduly prejudice Lomas' right to unearth all facts related to the issues in the Complaint and in the Answer and Counterclaim.

C. The Discovery is Neither Cumulative Nor Duplicative Of Other Discovery Conducted in this Matter.

Defendants assert that even if the information sought was not shielded from disclosure by the privilege, it is unnecessarily cumulative and duplicative. The assertion lacks merit.

First, it lacks substance. Defendants fail to identify any testimony that would be needlessly duplicated.

Second, while it is true that defendants Burns, Pratt-Heaney, Loftus and non-party Fuhrman attended the December 18th meeting with Attorney Lagasse and that each has been deposed, Lomas need not accept their self-serving testimony at face value, particularly since it is contradicted by their own e-mails.

Third, Fuhrman, who was involved in most of the communications with Attorney Lagasse as the "relationship person" on behalf of PWM, was unable to answer critical questions put to him at his deposition. *See* Dep. of Fuhrman, 8/26/16, pp. 77-78 (agreeing that he was "the relationship person"); 198-200 (testifying that he did not know when Attorney Lagasse first started drafting the buyout provision – "I don't know when he started drafting"); 219 (testifying that he did not know whether prior to drafting the compensation amendment Attorney Lagasse had begun drafting the buyout valuation) attached at Exhibit E. Attorney Lagasse's testimony is necessary to fill the gaps and to determine the accuracy of the information provided by Defendants. He could provide additional, confirming or conflicting testimony. But the adversarial process demands that Lomas be permitted to develop this evidence.

Fourth, Lomas has been judicious in his discovery strategy. Defendants and Fuhrman are the only individuals deposed to date. Lomas does not seek to prolong this matter. Indeed he is individually bearing his costs of litigation. But he requests the opportunity to conduct full and fair discovery regarding defendants' Counterclaim just as Defendants' have had more than a year to conduct discovery on the Amended Complaint. Defendants should not be permitted to file a complex, multiple count, 84 page Counterclaim, and then deprive Lomas of the opportunity to investigate it, refute it and otherwise defend against it with the best evidence available to him.

D. There Will Be No Delay In The Trial Due To A Deposition Of Attorney Lagasse.

Defendants' counsel represented on multiple occasions to Lomas' counsel and to this Court, that Defendants' counterclaim, when filed, would be "substantially similar to" the draft provided to Lomas on May 27, 2016.[4] On September 14, 2016, during a status conference attended by counsel, Judge Mintz, and Judge Jacobs, defendants' counsel urged the Court to keep the trial schedule[5]. Judge Mintz advised that if Defendants wanted to ensure the current schedule, they should close the pleadings and not file the threatened counterclaim. But defendants nonetheless filed their Counterclaim on September 23, 2016. And it is not substantially the same as their May 27, 2016 draft. In fact, it is double the length of the draft and contains 270 separately numbered and complexly drafted paragraphs. For the first time, it alleges a "pre-tax/post-tax issue", a fraudulent scheme between Lomas and his then counsel, and a new Confidential Client No. 3. It omits allegations that Confidential Client Nos. 1 and 2 were solicited by Lomas, and it adds new allegations that they were not properly transitioned. Thus, far from heeding Judge Mintz's warning, defendants not only filed a counterclaim, they filed one that is dissimilar to their earlier circulated draft by all measures. Thus, if there is a delay of the trial in this matter, it will not be due to any deposition of Attorney Lagasse.

[4] Defendants provided this draft in order to encourage discovery with respect to allegations that were not of record due to their pending Motion to Strike (Dkt. No. 137.00)

[5] Defendants' urgency to get to trial results from a prejudgment remedy that they characterize as "harsh." *See* Defendants' Opposition at p. 7. However, Defendants entered into the PJR voluntarily in order to avoid an evidentiary hearing, their counsel drafted the stipulation resolving the matter without judicial intervention, and their counsel read it into the record.

IV. CONCLUSION

For the foregoing reasons this Court should grant Plaintiff's Motion for Appointment of Commission and for Leave to Take Deposition in New York of David Lagasse, Esq.

Dated: October 13, 2016
Hartford, Connecticut

THE PLAINTIFF,
WILLIAM A. LOMAS

By: */s/ Thomas J. Rechen*
Thomas J. Rechen
Brittany A. Killian
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City Place I
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CERTIFICATE OF SERVICE

This is to certify that on October 13, 2016, a copy of the foregoing was served by e-mail and first class mail, postage prepaid, to all counsel of record as follows:

Richard J. Buturla, Esq.
Mark J. Kovack, Esq.
Berchem, Moses & Devlin, P.C.
75 Broad St.
Milford, CT 06460

Gerard Fox, Esq.
Edward D. Altabet, Esq.
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12 East 49th Street, Suite 2605
New York, NY 10017

/s/Thomas J. Rechen
Thomas J. Rechen

EXHIBIT A

MINTZ LEVIN

David R. Lagasse | 212 692 6743 | drlagasse@mintz.com

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December 18, 2013

Mr. Kevin Burns
Partner Wealth Management, LLC
33 Riverside Ave., 5th Floor
Westport, CT 06880

Re: Engagement of Mintz Levin as Legal Counsel

Dear Mr. Burns:

We are very pleased that Partner Wealth Management LLC has engaged Mintz Levin as legal counsel, and we look forward to working with you.

This engagement letter and the enclosed engagement documents are intended to provide you and Mintz Levin the clarity and protection that a carefully articulated agreement provides. The engagement documents are a formal way to (1) ensure that our representation adheres to the rules of professional responsibility that all licensed attorneys are obligated to uphold, (2) describe the scope of Mintz Levin's obligations to you and (3) delineate the terms of representation.

Mintz Levin has long placed client satisfaction as a paramount goal of its practice, and always has recognized that client satisfaction depends both on the quality of the Firm's legal work and, as important, on strong relationships built on mutual respect and good will. This engagement letter and the enclosed engagement documents are a direct reflection of that commitment.

As your legal counsel, we will represent Partner Wealth Management in connection with developing a partnership compensation plan and other, future matters that you may request and which we agree to accept.

Terms of the Mintz Levin Engagement. This engagement letter, together with the enclosed Engagement Memorandum to Mintz Levin Clients and the Firm's Billing, Disbursement and Expense Policies, both of which are incorporated herein by reference, describe the terms of Mintz Levin's engagement. Among other things, these documents explain the Firm's billing arrangements and procedures, discuss staffing, request an advance conflict of interest waiver and explain the respective responsibilities of Mintz Levin and our clients with regard to the Firm's engagement. Please read these enclosures carefully, and call me to discuss any questions that you may have. Execution and return of the engagement letter to us will signify your agreement to the provisions of this engagement letter, the Billing, Disbursement and Expense Policies and the Engagement Memorandum.

Conflicts. We have represented Jeffrey Fuhrman in connection with a number of matters historically and currently in connection with the negotiation of his employment terms with Partner Wealth Management. We have considered whether there are any conflicts between Mr. Fuhrman and Partner Wealth Management in connection with advising you in connection with matters unrelated to Mr. Fuhrman's employment and we have concluded that there are no actual or apparent conflicts that would prevent us from representing you in matters unrelated to his employment.

In the unlikely event that a conflict does arise between Mr. Fuhrman and Partner Wealth Management, however, we reserve the right to withdraw from representing Partner Wealth Management by providing you with a written notice of withdrawal and to continue to represent Mr. Fuhrman. Partner Wealth Management hereby consents to our continued representation of Mr. Fuhrman and agrees not to seek to disqualify us from representing him under these circumstances.

Initial Payments to Mintz Levin. As a good business practice and in anticipation of the time and resources Mintz Levin will commit to the representation, the Firm requests that Partner Wealth Management make an advance fee payment upon agreeing to engage Mintz Levin. This will confirm that you will make an initial payment to the Firm of $5,000.00 at commencement of the engagement. This payment will be refunded to the extent it is not earned. Any difference between the amount of this initial payment and the amount of the final bill shall be refunded or billed as appropriate, and the payment will be treated by Mintz Levin as required by applicable ethical rules, policies and procedures concerning the Firm's professional responsibility with respect to such advance payments by clients.

Mintz Levin is very pleased to have the opportunity for this representation, and we look forward to working with you. ***Please call us with any questions about this letter or its enclosures. Unless you have questions or special instructions for us, we assume that you have reviewed this letter in full and accept all of the terms outlined in this letter and the enclosures.***

Please do not hesitate to contact me at any point throughout the engagement with any questions or uncertainties you wish to discuss.

Please return an executed copy of this letter to my attention, along with the requested retainer, and thank you.

Very truly yours,

David R. Lagasse

Partner Wealth Management LLC

By: _____
Kevin Burns
Member

Enclosures (3): Duplicate engagement letter to be signed and returned to Mintz Levin;
Engagement Memorandum to Clients; and
Billing, Disbursement and Expense Policies

EXHIBIT B

1992 WL 139778

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut, Judicial District of Hartford-New Britain, at Hartford.

CARRIER CORPORATION
v.
The HOME INSURANCE COMPANY.

No. 35 23 83.
|
June 12, 1992.

MEMORANDUM OF DECISION ON DEFENDANTS'

RENEWED JOINT MOTION FOR COMPLIANCE

SCHALLER, Judge.

Procedural Background

*1 The plaintiff, Carrier Corporation ("Carrier"), has brought this declaratory judgment action to determine whether the defendant insurance companies must indemnify the plaintiff for cleanup costs, liability and fines, and defense costs incurred in connection with alleged hazardous waste contamination occurring at approximately forty-four sites in which the plaintiff has been or will be held liable for environmental damage. This case has involved hundreds of defendants, although not all of the defendants remain; the discovery requests have concerned hundreds of thousands of documents. Indeed, the privilege log alone involves over ten thousand documents.

The defendants in this case have undertaken a joint defense, and will be referred to herein as the defendants or joint defendants except where otherwise indicated.

The procedural history relevant to the instant motion follows:

On April 18, 1989, Carrier filed responses to the defendants' first set of interrogatories and requests for production of documents. Pursuant to the Case Management Order dated August 29, 1989, Carrier compiled a log for all documents withheld on the basis of claims of privilege and work product. According to the Case Management Order, the privilege log was required to contain, for each document withheld on the grounds of privilege or work product, information pertaining to the type of document, the number, date, author, addressee, recipients of copies, the subject matter, as well as the legal basis for withholding the document.

The defendants, arguing that the privilege log compiled by the plaintiff fell short of the requirements of the Case Management Order by failing to set forth with adequate specificity the subject matter of the documents withheld and the legal basis for withholding them, filed a motion for compliance on September 26, 1990. In that motion, the defendants sought an order requiring Carrier to revise its privilege log and to produce certain documents put at issue by the plaintiff through the filing of the underlying declaratory judgment action. The motion was heard by the court, Koletsky, J., who, on September 11, 1991, ordered, inter alia, that the plaintiff revise its privilege log to include with more specificity the information requested by the defendants and required by the earlier case management order, and that the privilege log conform "in terms of the amount of information disclosed and the specificity of the information" to the privilege log prepared by defendant Travelers in response to the plaintiff's request for production.

In response to Judge Koletsky's order, the plaintiff compiled and submitted a supplemental privilege log which included some of the additional information required by Judge Koletsky. The defendants claim, however, that the plaintiff has yet to comply with the guidelines set forth by Judge Koletsky, and that the plaintiff has otherwise failed to provide sufficient information in its supplemental privilege log to support its asserted claims of privilege and work product protection. In their renewed joint motion for compliance, the defendants request the court to order the plaintiff to produce all documents for which the supplemental privilege log entry does not meet or exceed the specificity required by Judge Koletsky's September 11, 1991 ruling; all documents for which the supplemental privilege log entry does not adequately support the plaintiff's claims of

attorney-client privilege or work product protection; all documents relating to matters which the plaintiff has put at issue by its claims for defense and indemnification; and other just and equitable relief. The defendants' motion is supported by a memorandum of law, a reply memorandum, and by copious exhibits, submissions, and affidavits.

***2** The plaintiff has objected to the motion, arguing, inter alia, that the law of the case prevents the defendants from reopening issues resolved by Judge Koletsky's September 11, 1991 order, that the supplemental privilege log complies with that order, that the plaintiff does not lose its attorney-client privilege or its work product protection simply by filing this lawsuit against its insurers. Plaintiff further argues that neither Judge Koletsky's order nor Connecticut law support the defendants' argument that attorney involvement is required to support a claim for work product protection. The plaintiff has supported its objection with a memorandum of law, a supplemental memorandum, and with numerous exhibits and submissions.

Issues

A. *THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT CLAIMS*

1. *Attorney-Client Privilege*

In their renewed joint motion for compliance, the defendants have raised at least three issues with respect to the plaintiff's claims of attorney-client privilege. First, the defendants argue that public, business, or technical information is not privileged; second, that communications to or from an attorney are privileged only when such communications take place within the context of an attorney-client relationship and when confidential communications are, in fact, made for the purpose of seeking legal advice; and, third, that communications sent to third parties, with a copy to the plaintiff's attorneys, are not confidential and, therefore, not protected by the privilege.

"The basic principles of the attorney-client privilege are undisputed. Communications between the client and attorney are privileged when made in confidence for the purpose of seeking legal advice." *State v. Burak,* 201 Conn. 517, 527, 518 A.2d 639 (1986), citing *Doyle v. Reeves,* 112 Conn. 521, 523, 152 A. 882 (1931); Tait & LaPlante, *Handbook of Connecticut Evidence* (1976) § 12.5. A widely-cited formulation of the privilege states that "(1) where legal advice of any kind is sought, (2) from a professional legal advisor in his capacity as such, (3) communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his instance permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *Rienzo v. Santangelo,* 160 Conn. 391, 395, 279 A.2d 565 (1971); *United States v. Goldfarb,* 328 F.2d 280, 281 (6th Cir.1964); see also Wigmore, *Wigmore on Evidence,* § 292, p. 584 (McNaughton Rev.1961). The plaintiff's claims of attorney-client privilege must satisfy these elements as they have been interpreted by decisional law and as more fully set forth below.

The burden of proving facts essential to the privilege is on the person asserting it. *State v. Hanna,* 150 Conn. 457, 465-66, 191 A.2d 124 (1963); *Tunick v. Day, Berry & Howard,* 40 Conn.Sup. 216, 219, 486 A.2d 1147 (1984). The question of whether a communication is privileged is a question of law for the court to decide. *Miller v. Anderson,* 30 Conn.Sup. 501, 505, 294 A.2d 344 (App.Div.1972).

***3** The defendants' first argument is that the public, business, and technical information is not protected by the privilege. In fact, public information is not protected by the attorney-client privilege. *Syracuse Supply Co. v. U.S. Lumber Co.,* 40 Conn.Sup. 198, 201, 484 A.2d 1377 (1985, Fracasse, J.); *SCM Corp. v. Xerox Corp.,* 70 F.R.D. 508, 515 (1976). Technical information, such as the results of research, tests and experiments, communicated to an attorney, is not protected by the attorney-client privilege unless such information is communicated to the attorney for a legal opinion or interpretation. *Hercules, Inc. v. Exxon Corp.,* 434 F.Supp. 136, 147 (citations omitted); see also *Willemijn Houdstermaatschaapij BV v. Apollo Computer,* 707 F.Supp. 1429, 1448-49 (D.Del.1989). The privilege does not protect non-legal communications, including business and technical advice, unless the communications are intended to meet problems which can be characterized as predominantly legal. *Cuno, Inc. v. Pall Corp.,* 121 F.R.D. 198, 203-04 (E.D.N.Y.1988). "Only if the attorney is 'acting as a lawyer'-giving advice as to the *legal implications* of a proposed course of business-may the privilege be properly invoked." (emphasis added) *Willemijn Houdstermaatschaapij BV v. Apollo Computer,* supra, 1448, quoting *Hercules, Inc. v. Exxon Corp.,* supra, 147.

The attorney-client privilege attaches to the communication itself, not to the facts communicated, and, therefore, may not be used to protect the disclosure of underlying facts to opposing counsel. *Buford v. Holladay,*

133 F.R.D. 487, 491 (S.D.Miss.1990); *Solomon v. Scientific American, Inc.,* 125 F.R.D. 34, 37 (S.D.N.Y.1988). "Legal departments are not citadels into which public, business or technical information may be placed to defeat discovery and thereby ensure confidentiality." *SCM Corp. v. Xerox Corp.,* supra, 515 (1976). Thus, the attorney-client privilege does not protect documents or communications that can be characterized as conveying purely technical or business information, nor does the privilege protect against the disclosure of the facts communicated. "Whatever legal judments are contained in the documents would merit protection, if at all, as work product, not by application of the attorney-client privilege. *Hickman v. Taylor,* 329 U.S. 495, 508, 67 S.Ct. 385, 91 L.Ed. 451 (1947)." *SCM Corp. v. Xerox,* supra, 515.

Because the privilege exists only to secure the client's subjective freedom of communication, *State v. Hanna,* supra, 466; *Syracuse Supply Co. v. U.S. Lumber Co.,* supra, 201, the communication sought to be protected by the attorney-client privilege must be confidential, *LaFaive v. DiLoreto,* 2 Conn.App. 58, 65, 476 A.2d 626 (1984), citing *State v. Hanna,* supra, 466. The attorney-client privilege applies only to "that information born of confidential communication." *Trumpold v. Besch,* 19 Conn.App. 22, 28, 561 A.2d 438, cert. denied 212 Conn. 812 (1989), U.S. cert. denied 100 S.Ct. 1476. A communication made to or in the presence of third parties is not privileged "unless those other individuals present are agents or employees of the attorney or the client and their presence is necessary to the consultation." *State v. Gordon,* 197 Conn. 413, 424, 497 A.2d 965, 504 A.2d 1020 (1985).

***4** The hallmark of a privileged communication is that it must be disclosed by the client to the attorney with a "reasonable expectation of confidentiality." *State v. Burak,* supra, 526, citing *State v. Colton,* 174 Conn. 13, 138-39, 384 A.2d 343 (1977). It is a reality of our adversary system, however, that attorneys must often rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. *United States v. Nobles,* 422 U.S. 225, 237-38, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975); *United Coal Companies v. Powell Construction Co.,* 839 F.2d 958, 966 (3rd Cir.1988). For that reason, the attorney-client privilege may be used to protect communications made through agents for communication and to persons hired by the attorney to collect and assemble facts necessary for the representation, but to no greater extent than they would have been had they been made directly between the principals. *Syracuse Supply Co. v. U.S. Lumber Co.,* supra, 201. Therefore, where a client invokes the attorney-client privilege for communications made by, to, or in the presence of third parties other than the client or the attorney, such third parties must be agents of either the attorney or the client, and such parties must be "necessary to the consultation." *State v. Gordon,* supra, 424.

Where the party asserting the attorney-client privilege is a corporation, the court must also determine which officers or employees constitute the "corporate client." The Connecticut courts have not yet developed or adopted a test to determine the scope of the attorney-client privilege in this situation. According to the "control group" test, which is the traditional method for determining the identity of the corporate "client," an employee or other representative of a corporation may be considered the client "if the employee making the communication ... is in a position to control or even to take a substantial part in the decision about any action which the corporation may take upon the advice of the attorney." *City of Philadelphia v. Westinghouse Electric Corp.,* 210 F.Supp. 483, 485 (E.D.Pa.1962). The United States Supreme Court has declined to adopt as determinative the control group test, opting instead for a case by case, fact-oriented approach rather than a broad statement of principle. See *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). In doing so, the Court noted that the control group test may be too narrow in that it "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." Id., 392. Responding to this and like criticism, the New York courts have formulated the following test: In order for the attorney-client privilege to apply in the corporate context, (1) the communication should have been made for the purpose of securing legal advice; (2) the employee making the communication should have done so at the direction of his corporate superiors; (3) the superiors should have made the request so that the corporation could secure legal advice; (4) the subject matter of the communication should have been within the scope of the employee's duties; (5) and the communication should not have been disseminated beyond those persons who needed to know the information. *Cuno, Inc. v. Pall Corp.,* supra, 203-04.

***5** The court finds the New York test satisfactory in that it protects the corporation's right to seek the advice of counsel, while at the same time ensuring that the communications protected are clothed in at least some degree of confidentiality. Accordingly, this test shall be applied to determine the scope of the privilege where the client is a corporation. It is thus, incumbent upon the plaintiff to prove, in addition to the above outlined

general rules of attorney-client privilege, each element of the test for application of the privilege in the corporate context.

2. *Work Product*

In their motion to compel production of documents withheld by the plaintiff on the ground of work product protection, the defendants argue that, for the protection to apply, documentary and other evidence must have been prepared; 1) by or at the request of an attorney; 2) in anticipation of litigation; and 3) by the party or by the party's representative. These issues will be considered together.

The Connecticut Supreme Court has defined work product as "the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." *Stanley Works v. New Britain Redevelopment Agency,* 155 Conn. 86, 95, 230 A.2d 9 (1967). The definition of work product has since been revised and codified in Practice Book § 219, which states that:

> a party may obtain discovery of documents and tangible things otherwise discoverable ... and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative only upon a showing that the party seeking discovery has a substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials ..., the court shall not order disclosure of the mental impressions, conclusions, legal opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

The burden of establishing that the information sought constitutes work product is upon the party asserting such a claim. *Buckland v. New Haven Podiatry Associates,* 4 CSCR 176 (January 10, 1989, Flanagan, J.), citing *Hydramar, Inc. v. General Dynamics Corp.,* 119 F.R.D. 367, 369 (E.D.Pa.1988); *Conoco, Inc. v. United States Dept. of Justice,* 687 F.2d 724, 730 (3d cir.1982).

The Practice Book definition of work product extends only to materials prepared "by or for another party or by or for that party's representative." Practice Book § 219. The *Stanley Works* decision included an additional requirement that "[t]he attorney's work must have formed an essential step in the procurement of the data which the opponent seeks, and the attorney must have performed duties normally attended to by attorneys." *Stanley Works v. New Britain Redevelopment Agency,* supra. The parties disagree on the issue of whether this requirement was modified by the subsequent amendment of the Practice Book, which does not contain an "attorney involvement" requirement, or whether the term "representative" contained in the Practice Book definition of work product incorporates this requirement.

***6** While the Practice Book did not adopt language identical to that contained in the *Stanley Works* decision, numerous cases decided since the adoption of Practice Book § 219 have cited *Stanley Works* in holding that attorney involvement is a necessary element of the work-product doctrine, while none have held that attorney involvement is not required. See, e.g., *Witkowski v. Gryboski,* 5 Conn.L.Rptr. 417, 417-418 (January 2, 1992, Sheldon, J.); *Emerick v. Moraes,* J.D. Hartford/New Britain at Hartford (January 3, 1992, Walsh, J.); *Litwak v. Lemans,* 1 Conn.L.Rptr. 778, 779 (June 19, 1990, Jones, J.); *Gonzalez v. White, Jr.,* 5 CSCR 545 (June 18, 1990, Jones, J.); *Falvey's Inc. v. Republic Oil Co., Inc.,* 3 CSCR 931, 932 (November 3, 1988, Schimelman, J.). "Connecticut has adopted a narrower concept of the work product privilege; i.e., the privilege is limited to work product of *lawyers.* " *Falvey's Inc. v. Republic Oil Co., Inc.,* supra, 932 (emphasis added), citing *Jacques v. Cassidy,* 28 Conn.Sup. 212, 219 (Super.Ct.1969). Thus, a lack of involvement by plaintiff's counsel in securing the requested information would bar the application of the work-product privilege to the requested information. *Jacques v. Cassidy,* supra; see also *Litwak v. Lemans,* supra, 779; *Gonzalez v. White, Jr.,* supra, 545. The court concludes that "attorney involvement" in the production of the requested documents or information is required.

Unlike the "attorney involvement" element of the work product doctrine, the "in anticipation of litigation" requirement was made express by the adoption of Practice Book § 219, which limits application of the work product rule to materials "prepared in anticipation of litigation or for trial." This requirement seeks to distinguish between materials prepared in the ordinary course of business, which are "clearly discoverable under Practice Book § 218," and those prepared for litigation, which may be protected by the work product rule, a distinction which

can become particularly problematic where both motives are involved. See *Falvey's, Inc. v. Republic Oil Co.*, supra, 932.

The *Stanley Works* decision provides work product protection for the products of an attorney's activities "when those activities have been conducted with a view to pending or anticipated litigation." *Stanley Works v. New Britain Redevelopment Agency,* supra, 95. The *Falvey's* court noted that "certainly, litigation is a contingency to be recognized" where the allegedly improper disposal of hazaradous wastes is involved, but "given the equally reasonable desire" of the plaintiffs to satisfy governmental orders, "it cannot be said that the plaintiff's records were not prepared in the ordinary course of business." *Falvey's, Inc. v. Republic Oil Co.*, supra, 932 (finding that the materials at issue had in fact been prepared in anticipation of litigation). A more restrictive application of the work-product rule was recognized in *Lieberman v. Freedom of Information Commission,* 3 CSCR 711, 712 (August 2, 1988, Ripley, J.), where it was held that work product protection only applies to materials obtained or produced when a "*specific* legal action is pending or contemplated." (emphasis added) Id.

*7 Because application of the work product doctrine tends to prevent a full disclosure of facts relevant to the truthful disposition of a case, and because the rule is an exception to the general rule permitting discovery of "documents and tangible things," *State v. Cascone,* 195 Conn. 183, 186, 487 A.2d 186, appeal after remand 10 Conn.App. 163, cert. denied 203 Conn. 808 (1985), the rule should be narrowly interpreted. Accordingly, the work product rule may be used to protect against disclosure of materials or facts obtained or produced by an attorney or the attorney's representative in preparation for a particular litigation, pending or reasonably anticipated; materials otherwise subject to discovery may be subject to a motion to compel.

B. *THE "AT ISSUE" EXCEPTION AND RELATED ISSUES*

1. *The "Placing-at-Issue" Issue*

The defendants have advanced the argument that fairness and equity require that the plaintiff produce documents relating to matters that the plaintiff has itself put into issue by filing this declaratory judgment action. The plaintiff argues in response that it does not forfeit its attorney-client privilege or its work product protection simply because it exercises the right to enforce its rights under the various contracts of insurance at issue in this action.

It is noted that no Connecticut appellate court has addressed the "at issue" exception to the attorney-client privilege. However, courts in other jurisdictions have addressed the issue, although with varying conclusions. See, e.g., *Handgards, Inc. v. Johnson & Johnson, Inc.*, 413 F.Supp. 926, 929 (N.D.Cal.1976; *Truck Insurance Exchange v. St. Paul Fire & Marine Insurance Co.*, 22 F.R.D. 129 (E.D.Pa.1973); *Sedco International, S.A. v. Cory,* 683 F.2d 1201 (8th Cir.), cert. denied 459 U.S. 1017 (1982); *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095 (7th Cir.1987); *Leucadia, Inc. v. Reliance Ins. Co.*, 101 F.R.D. 674 (S.D.N.Y.1983); see also Note, Developments in the Law of Privileged Communications, 98 Harv.L.Rev. 1450, 1637-43 (1985). While these and other cases have identified the existence of an "at issue" exception, also known as the doctrine of implied waiver, there is little consensus on its scope and application.

The attorney-client privilege exists only to secure the client's subjective freedom of consultation with his or her professional legal advisor, *State v. Hanna,* supra 465-66, while the work product rule is designed to protect the right of an attorney to thoroughly prepare a case by precluding a less diligent adversary from taking undue advantage of an opponent's efforts. See *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 835, 91 L.Ed. 451 (1947; *Falvey's Inc. v. Republic Oil Co., Inc.,* supra, 932. Because the exercise of these protections are viewed as obstructing the truth-finding process and tending to prevent a full disclosure of the truth, the scope of the protections is narrowly construed. *State v. Cascone,* supra, 186; see also *Fine v. Facet Aerospace Products Co.*, 133 F.R.D. 439 (S.D.N.Y.1990). Thus, the injury that would inure to the attorney-client relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation before the privilege may be upheld. See *State v. Cascone,* supra; 8 Wigmore, *Wigmore on Evidence,* (McNaughten Rev.1961) § 2285, p. 527. Furthermore, the attorney-client privilege should be applied only when necessary to effect its limited purpose of encouraging complete disclosure by the client to the attorney; the work product privilege should be applied only where necessary to protect those aspects of the adversarial system which underlie its existence. See *Torney v. U.S.*, 840 F.2d 1424, 1428 (9th Cir.1988). In addition, the privilege may not be used to prejudice an opponent's case or to disclose some selected communications for self-serving purposes. *U.S. v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.1991); *In re Von Bulow,* 828 F.2d 91, 101-02 (2d Cir.1987).

*8 In a civil damages action,

> fairness requires that the privilege holder surrender the privilege to the extent that it will weaken in a meaningful way, the defendant's ability to defend. That is, the privilege ends at the point where the defendant can show that the plaintiff's civil claims, and the probable defenses thereto, are enmeshed in important evidence that will be unavailable to the defendant if the privilege prevails.

Greater Newburyport Clamshell Alliance v. Public Service Co. of New Hampshire, 838 F.2d 13, 20 (1st Cir.1988).

The "at issue" doctrine, itself, originally gained acceptance in situations where the holder of the privilege relies on a legal claim or defense, the truthful resolution of which requires consideration of the confidential communications. See, e.g., *Byers v. Burleson,* 100 F.R.D. 436, 440 (D.D.C.1983) (legal malpractice action); *Handgards, Inc. v. Johnson & Johnson, Inc.,* supra, 929 (special defense of good faith reliance on the advice of counsel); *Tasby v. United States,* 504 F.2d 332, 36 (8th Cir.), cert. denied 419 U.S. 1125 (1975) (criminal defendant appealing on the grounds of inadequate legal representation). *Hearn v. Ray,* 68 F.R.D. 574 (E.D.Wash. 197) held that the "placing-at-issue" waiver applies where the privilege holder, through some affirmative act, makes an assertion that renders otherwise privileged matter directly relevant to the action, and where upholding the privilege would deprive the opposing party of information necessary to prosecute his or her claim or defense. Id., 581.

The genesis of this doctrine is grounded in fairness to the opposing party and in a judicial balancing of the costs to the truthful disposition of the litigation against the policies underlying the attorney-client privilege and the work product rule. See *Byers v. Burleson,* supra, 440; *Waste Management, Inc. v. International Surplus Lines,* 144 Ill.2d 178, 161 Ill.Dec. 74, 579 A.2d 322 (1991); see also J. Moore, Moore's Federal Practice § 26-60[6] (2d ed. 1983).

The placing-at-issue rule, however, while finding its justification in principles of fairness and equity, has been criticized as eviscerating the full, system-wide benefits of the privileges, and as providing an exception which cannot easily be limited. See Note, *Developments in the Law of Privileged Communications,* 98 Harv.L.Rev. 1450, 1640-43 (1988). Generally, the courts have been reluctant to pierce the protections provided by the privileges in situations where the nature of the protected communications and the legal effects thereof are not the direct subject of the dispute, but where the communications enter the case as an element of the opposing party's *proof* of a claim or defense. See *Lorenz v. Valley Forge Ins. Co.,* supra 1097-98; *Handgards, Inc. v. Johnson & Johnson, Inc.,* supra, 929; but see *Waste Management, Inc. v. International Surplus Lines,* supra.

Because there are satisfactory alternative grounds for appropriate resolution of the pending issues, the court declines to apply the "at issue" exception, at this time.

2. *The "Cooperation Clause" issue*

***9** In their original motion for compliance (before Judge Koletsky), the defendants attempted to procure the withheld documents by invoking the "cooperation clause" contained in the various contracts of insurance entered into by the parties. This clause contains boilerplate language, commonly included in contracts for insurance, which requires the insured to assist the insurer in defending claims against the insured. It is noted that a duty to cooperate may exist even in the absence of an express contractual provision, by virtue of the duty of good faith and fair dealing, which applies to insurance contracts, see *Hoyt v. Factory Mutual Liberty Ins. Co.,* 120 Conn. 156, 159, 179 A. 842 (1935); see also *Magnan v. Anaconda Industries,* 193 Conn. 558, 566, 479 A.2d 781 (1984).

In his earlier order rendered in a bench decision, Judge Koletsky held that the cooperation clause does not apply "unless there is a defense being provided" by the insurer. The existence of the cooperation clause affects the applicability of the attorney-client privilege in two important ways.

First, it is axiomatic that in order for a communication to be protected by the attorney-client privilege, the client must entertain at least a reasonable expectation of confidentiality. *State v. Cascone,* supra, 186-87, n. 3. Absent indications to the contrary, where an insured is contractually required to assist its insurer in preparing a defense to claims brought against the insured by third parties, the insured cannot *in good faith* entertain a reasonable expectation that the facts underlying those claims will not be disclosed to its insurer once the claim for coverage is made. "Good faith" has been defined as "honesty in fact" General Statutes § 42a-1-201(19), as "honesty of purpose, freedom from intention to defraud," and as "[a]n honest intention to abstain from taking an unconscientious advantage of another, *even through the*

forms or technicalities of law...." (citations omitted). *Phillipe v. Thomas,* 3 Conn.App. 471, 474-75, 489 A.2d 1056 (1985).

When the claim first arises, insurer and insured are not adverse, but are in privity and share a common interest in minimizing their exposure to legal and monetary liability and, until there is a declaration to the contrary, insurers continue to bear responsibility for settlement and litigation costs in the underlying action. *Waste Management v. International Surplus Lines,* supra, 335-36. Furthermore, given the fact that the insurer is dependent upon the insured for fair and complete disclosure, see *Arton v. Liberty Mutual Ins. Co.,* 163 Conn. 127, 134, 302 A.2d 284 (1972), and given the fact that the insured is bound to exercise good faith and fair dealing, even if the plaintiff had intended to keep such information confidential, such an expectation would not have been reasonable. Therefore, while these communications may enjoy privileged status as to other parties, they should not properly be privileged as to insurers, who may well bear the ultimate burden of payment, because those communications relating to the underlying claims against the plaintiff were not produced with a reasonable expectation that they would be kept confidential from the insurer. Id.

***10** The existence of the cooperation clause bears on a second problem inherent in the plaintiff's work product claims. The work product rule protects an attorney from being forced to disclose files prepared by the attorney in anticipation of litigation. Practice Book § 219; *Stanley Works v. New Britain Redevelopment Agency,* supra, 95. Because the dominant purpose of the work product rule is the protection of the adversary system, see *United States v. Nobles,* supra, 237-38, and because it is an exception to the general rule permitting discovery, the work product rule appropriately has been given a narrow interpretation consistent with its underlying purposes, see *State v. Cascone,* supra 186; *Falvey's Inc. v. Republic Oil Co., Inc.,* supra, 932. Faced with a situation similar to that presented here, the *Waste Management* court noted that:

> In the typical case, material is generated in preparation for trial against an adversary who may seek disclosure of his opponent's work product. Here, the sought-after materials were, in the first instance, prepared for the mutual benefit of insureds and insurers against a third-party adversary.... While the work-product materials, had they been requested by the third-party opponent in the underlying lawsuit, would have been entitled to protection, that same protection is not warranted here. This, we firmly believe, was not the situation contemplated by *Hickman [v. Taylor*]....
>
> Insureds here seek to use the doctrine's protection in a manner that is inconsistent with the purpose and intent of the rule.... To permit the insured's attorney to invoke the work-product rule as a bar to discovery in this instance would effectively allow the rule to be used as sword rather than, as intended, a shield.

Waste Management, Inc. v. International Surplus Lines, supra, 330.

Like the situation presented in *Waste Management,* the instant case does not present circumstances contemplated by *Hickman v. Taylor, Stanley Works,* or Practice Book § 219 because it appears that, at least, some of the materials sought were produced at a time when the parties shared predominantly common, *nonadversarial* interests and when, indeed, the insured was under a duty to cooperate with the insurer in its defense of the underlying action. Thus, while, ordinarily, materials prepared for an earlier litigation may enjoy work product protection in a subsequent action, see, e.g., *Midland Investment Co. v. Van Alstyne, Noel & Co.,* 59 F.R.D. 134 (S.D.N.Y.1973), in a case in which the parties shared a common interest in the underlying litigation ... one characterized by contractual privity, shared exposure, and the duty of cooperation, ... the parties may not refuse to disclose to one another materials obtained or produced within the scope of their common interest. Furthermore, regardless of whether the duty to cooperate extends to situations where the insurer denies coverage, the work product rule permits sufficient consideration of fairness and equity, see, e.g., *Hearn v. Ray,* supra, 581-82; *Handgards, Inc. v. Johnson & Johnson, Inc.,* supra, 929, to prohibit an insured from simultaneously seeking payment for liability incurred and denying the insurer's right to examine materials related to the underlying claims.

3. *Conclusion and Order*

***11** As noted above, because the defendants' motion for compliance can be decided satisfactorily on preferable alternative grounds, the court declines to adopt the "at issue" doctrine in this instance. For the foregoing reasons, however, the court does conclude that the attorney-client privilege and work product protection are not applicable to materials generated in connection with the underlying actions against the plaintiff by third parties, for which the plaintiff seeks indemnification and/or defense costs from the defendants under insurance contracts containing provisions requiring cooperation. However, these protections may be available to bar disclosure of any communications or materials generated in preparation for this declaratory judgment action, subject to the principles of applicable law articulated in this memorandum of

decision.

The nature of this decision renders it unnecessary to determine whether individual entries presently contained in the privilege log comply wih the orders previously rendered by the court, Koletsky, J.

The court anticipates that the principles and conclusions contained in this decision will provide sufficient guidance to the parties to enable compliance with discovery requests where claims of attorney-client privilege or work product protection have been made. The vast number of such claims effectively prevents judicial resolution of the disputes on an individual basis. Where necessary, special protective orders may be sought with regard to individual documents or information on a limited basis, however.

Accordingly, the court orders the plaintiff to comply with the discovery requests of defendants by applying the principles in this decision. Where a claim of privilege or work product is reasserted, the reason for such assertion must be accompanied by a reference to the principles articulated in this decision, together with factual representations sufficient to enable the court to determine the issue. Correspondingly, any subsequent motions to compel dealing with claims of privilege or work product shall also refer to the principles articulated herein. In the event that, hereafter, an issue of privilege or protection under the work product doctrine arises in a context reasonably governed by this decision, and a party either asserts the attorney-client privilege or work product protection or claims the unavailability thereof in contravention of the principles of this decision, sanctions may be requested by any affected party to the action.

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William R. Harris, et al., Plaintiffs,

v.

Edwin E. Wells, Jr., et al Defendants.

Edwin E. Wells, Jr., et al., Plaintiffs,

v.

William R. Harris, et al., Defendants.

B–89–391 (WWE), B–89–482 (WWE).

|

Sept. 5, 1990.

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EGINTON

RULING ON PENDING MOTIONS

*1 Familiarity is presumed with the convoluted factual and procedural background behind these consolidated lawsuits in which discovery is being coordinated with a related action pending in the District Court for the Central District of California. (*See* Dkt. # 155). The Court will briefly summarize only those facts relevant to the currently pending discovery motions.

FACTS

On December 20, 1989, this Court reserved decision on a Motion to Compel filed by three of the Wells Group defendants. Decision was reserved pending review of approximately 100,000 documents produced by Harris and AroChem in response to the Wells Group's requests. These documents were the subject of a protective order entered by this Court on December 29, 1989. Upon completion of this review, the Wells Group was to inform the Court whether or not it intended to renew its Motion to Compel.

On July 13, 1990, a hearing was held before this Court on a related matter. At that hearing the Wells group informed the Court that a review of the documents had been completed and it would be renewing its December, 1989 Motion to Compel. Pursuant to this Court's order the parties have filed briefs updating the issues raised in the Wells Group's original Motion to Compel and raising all other discovery issues which they contend remain outstanding.

In the time between the filing of its Motion to Compel and the July 13, 1990 hearing, the Wells group served subpoenas on approximately 23 non-parties seeking the production of documents, many of which the Wells group claims have been improperly withheld by Harris and AroChem. In response to these subpoenas, AroChem has filed two motions for protective orders prohibiting the Wells group from obtaining discovery from these non-parties. Approximately 16 of these non-parties, apparently reluctant to get involved in this dispute, have refused to respond to these subpoenas until ordered to do so by this Court or the District Court in California. In response, the Wells group filed a Motion to Compel in the District Court for the Central District of California seeking to compel production of documents from U.S.A. Petroleum, one of the non-parties who had earlier been served with a subpoena. A hearing on this matter was held before Magistrate Brown on August 21, 1990. The Magistrate declined to rule on this motion and deferred to this Court's ruling on the pending discovery motions. The Wells group has also filed a Motion to Compel production from Harry E. Peden, III, an attorney and director of

AroChem, who was added as a defendant in the Wells amended complaint filed on April 10, 1990. This ruling will address the two motions to compel filed by the Wells group and the two motions for protective orders filed by AroChem.

DISCUSSION

I. *THE WELLS GROUP'S MOTION TO COMPEL PRODUCTION FROM HARRIS AND AROCHEM*

The Wells group claims that Harris and AroChem have failed to produce many highly relevant documents. In its Motion to Compel, the Wells group lists eleven categories of documents which it claims Harris and AroChem has failed to produce. The Court will address each of these claims individually.

**2 1) *Documents regarding the stock ownership of AroChem* (Document Request Nos. 1 and 2)

AroChem has agreed to produce these documents, therefore, there is no need for an order compelling such production.

2) *Documents regarding the refurbishment and operation of the facility* (Document Request Nos. 3, 5, 6, 8, 28, 36, 41 and 44)

Harris and AroChem are hereby ordered to produce all documents in their possession which are responsive to these requests and which have not already been produced.

3) *Documents relating to the escrow arrangement* (Document Request No. 4)

Harris and AroChem are hereby ordered to produce all documents relating to the $2.3 million escrow fund provided to them by Victory including but not limited to all documents relating to any drawdowns of that fund, the intended or actual use of any funds which were drawn down and the repayment of such funds, if any.

4) *Documents relating to Harris' and AroChem's trading activities* (Document Request Nos. 9, 10 and 37)

Harris and AroChem are hereby ordered to produce all documents relating to the purchase or sale of petroleum or petrochemical feedstocks or products by AroChem or by Harris (either individually, on behalf of AroChem, or through the use of AroChem's facilities). The Wells Group's request is denied, however, insofar as it relates to the personal trading activity of V.J. Dispenza, Joseph Sheperd or Harold Sebastian.

5) *Documents relating to actual or proposed financing to be provided to Harris or AroChem* (document Request Nos. 15, 20, 22, 38, 42, 46 and 47)

Harris and AroChem are hereby ordered to produce all documents which are responsive to these requests and which have not already been produced.

6) *Documents relating to compensation paid to AroChem employees, directors or consultants* (Document Request Nos. 19 and 45)

Harris and AroChem are hereby ordered to produce all documents which are responsive to these requests.

7) *Documents relating to members of AroChem's Board of Directors* (Document Request Nos. 18, 23 and 26)

These requests are hereby denied as presently framed. The requests are overbroad and should be revised to comply with the requirement of the Federal Rules that discovery requests "set forth the items to be inspected either by item or category with reasonable particularity." Fed.R.Civ.P. 34(b).

8) *Documents relating to Harris' Business Dealings* (Document Request Nos. 25 and 29)

Harris and AroChem are hereby ordered to produce all documents in their possession which are relevant to these requests.

9) *Documents relating to AroChem's Financial and other records* (Document Request Nos. 32, 33, 34, 35, 39 and 40)

Harris and AroChem are hereby ordered to produce all documents responsive to these requests to the extent that they have not already done so.

10) *Correspondence and documents relating to the Wells Group* (Document Request Nos. 31 and 43)

These requests are hereby denied as presently framed. The requests are overbroad and should be revised to comply

with the requirement of the Federal Rules that discovery requests "set forth the items to be inspected either by item or category with reasonable particularity." Fed.R.Civ.P. 34(b).

*3 11) *Documents relating to Harris' claims for relief* (Document Request Nos. 48–59)

These requests are hereby denied as presently framed. The requests are overbroad and should be revised to comply with the requirement of the Federal Rules that discovery requests "set forth the items to be inspected either by item or category with reasonable particularity." Fed.R.Civ.P. 34(b).

All documents previously produced by Harris and AroChem are to be supplemented to include all responsive documents that were prepared or generated after July 17, 1989 and up to April 10, 1990, the date of the filing of the Wells Amended Complaint. Documents to be produced as a result of this order are to include all responsive documents generated up to the date of the filing of the Wells amended complaint.

Given the nature of the allegations in this case, it is hereby ordered that all documents that are produced in this litigation are subject to the December 20, 1989 protective order issued by this Court in connection with an earlier document production. Any violations of that order will be taken very seriously by this Court and upon proof of such violations, sanctions will be imposed.

II. *THE WELLS GROUP'S MOTION TO COMPEL PRODUCTION FROM HARRY PEDEN III*

In response to the Wells Group's document requests, Peden refused to produce seven categories of documents on the grounds that the documents in these categories are either irrelevant or are protected from disclosure by the attorney-client privilege. After a review of the categories of documents withheld (*see* Wells' Memorandum in Support of Motion to Compel at pp. 10–11), the Court finds that the specific categories of documents sought by Wells are relevant to the core issues of this litigation and certainly meet the standard of Rule 26 of the Federal Rules of Civil Procedure which allows for discovery of "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351 (1978).

The Court also finds that these documents are not protected by the attorney-client privilege. When the client is a corporation, the attorney's obligation to protect the client's confidences runs to the corporate entity and not to any individual officer. *See Avianca, Inc. v. Corriea,* 705 F.Supp. 666, 680 n. 4 (D.D.C.1989); *Conn. Rules of Professional Conduct,* Rule 1.13 (applicable under Rule 3(a) of the Local Rules of this Court); Committee on Professional Ethics of the Connecticut Bar Association, Formal Op. 88–12 (1988), *reprinted in ABA/BNA Lawyers' Manual on Professional Conduct* 901:59 (1988). As a Delaware corporation, AroChem's directors are entrusted with the responsibility to manage the affairs of the corporation. Del.Code Ann., tit. 8, § 141 (1983). Consequently, it the corporation's directors who hold and control the corporation's attorney-client privilege. *See Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343 (1985); *In re O.P.M. Leasing Servs., Inc.,* 670 F.2d 383, 386 (2d Cir.1982).

*4 The question of the propriety of an assertion of privilege by one director against another was addressed in *Kirby v. Kirby,* No. 8604, slip op. (Del.Ch. July 29, 1987). In that case the court held that the attorney-client privilege belonging to the corporation cannot be invoked against its own directors. The Court found that under Delaware corporate law, "the directors, collectively, were the client at the time the legal advice was given ... [and they must] be treated as the 'joint client' when legal advice is rendered to the corporation through one of its officers or directors." *Id.* at 7.

Similarly, in litigation between shareholders and the corporate entity, the corporation cannot assert the attorney-client privilege against its shareholders. *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir.1970), *cert. denied,* 401 U.S. 974 (1971). *See also Quintel Corp., N.V. v. Citibank, N.A.,* 567 F.Supp. 1357 (S.D.N.Y.1983). Wells is both a shareholder and a director of AroChem. He has filed a derivative lawsuit on behalf of all AroChem shareholders. Moreover, even if a legitimate claim of privilege could have been asserted by Peden against Wells and/or the shareholders, Wells has in this Court's opinion demonstrated good cause to overcome such claims of privilege. *See Garner v. Wolfinbarger,* 430 F.2d 1093, 1104 (5th Cir.1970), *cert. denied,* 410 U.S. 974 (1971).

Finally, Peden has served AroChem not only as its legal advisor, but has served as an officer and director of the corporation and has apparently been involved in many aspects of the corporation's business. Peden's involvement in the business of AroChem further undermines his claim of privilege. *See United States v. International Business Machines Corp.*, 66 F.R.D. 206, 212–213 (S.D.N.Y.1974). For these reasons, Peden's claims of attorney-client privilege as a reason for his refusal to produce the requested documents must fail and the Wells Group's Motion to Compel Production of Documents from Peden must be granted. [1]

III. *AROCHEM'S MOTION FOR A PROTECTIVE ORDER*

Finally, the Court turns to AroChem's motions seeking two protective orders barring discovery by the Wells Group from various nonparties upon whom the Wells Group has served subpoenas and notices of depositions.

The Court finds that many of the requests served on these nonparties are duplicative of requests which have been served on Harris, AroChem and Peden. It is likely that a substantial portion of the discovery sought from these nonparties will be unnecessary once Harris, AroChem and Peden have produced the documents which are the subject of this ruling. Given the nature of the allegations in this case and the questions of credibility upon which this litigation turns, the most prudent course of conduct is one which, to the extent possible, minimizes the damage to AroChem's business during the course of this litigation. At the very least, discovery should be stayed against these nonparties until it can be determined whether or not all the documents sought by the Wells Group can be obtained from the parties. This result is desirable since all of these nonparties are engaged in business with AroChem. Constant attempts to bring these business associates into this litigation may well have negative effects on these business relationships. Therefore, this Court will grant AroChem's Motions for Protective Orders until such time as the Wells Group has reviewed the documents produced as a result of this ruling. At that time the Wells Group may, upon demonstrating that there remain documents or other information that can be obtained only through the conduct of discovery from non-parties, move to vacate these orders.

CONCLUSION

***5** For the foregoing reasons, the Wells Group's Motion to Compel Production of Documents from Harris and AroChem is GRANTED in part and DENIED in part; the Wells Group's Motion to Compel Production from Harry Peden III is hereby GRANTED; and AroChem's two motions for protective orders are hereby GRANTED to the extent noted above.

All Citations

Not Reported in F.Supp., 1990 WL 150445

Footnotes

1 In opposition to the Wells Group Motion to Compel, Peden argues only that the motion should be denied because counsel failed to comply with the requirement of Local Rule 9(d)(4) that there be a good faith attempt to resolve the issues prior to filing such a motion. The Wells Group claims to have complied with this requirement but to no avail. Denial of the Motion to Compel on the ground that the parties have failed to make attempts to resolve these issues would serve only to delay these proceedings further. Moreover, the history of this litigation to date suggests that any attempts at resolution will be futile at this time. Thus, without determining whether any good faith discussions in fact took place, the Court declines to deny the motion for failure to comply with the local rule.

1987 WL 14862
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.

Allan P. KIRBY, Jr., Grace K. Culbertson and Ann K. Kirby, Plaintiffs,
v.
Fred M. KIRBY, II, Walker D. Kirby, Alice K. Horton, Fred M. Kirby, III, S. Dillard Kirby and Jefferson Kirby, individuals, and F.M. Kirby Foundation, Inc., a Delaware corporation, Defendants.

Submitted: Feb. 6, 1987.
Decided: July 29, 1987.

Attorneys and Law Firms

Grover C. Brown, Edward M. McNally, and Mary M. Johnston, Morris, James, Hitchens & Williams, Wilmington, Delaware and Robert P. Buford, Hunton & Williams, Richmond, Virginia, of Counsel, for plaintiffs.

Edmund N. Carpenter, II, and William W. Bowser, Richards, Layton & Finger, Wilmington, for individual defendants.

Aubrey B. Lank, and Brian A. Sullivan, Theisen, Lank, Mulford & Goldberg, Wilmington, Attorneys for Defendant F.M. Kirby Foundation.

MEMORANDUM OPINION

BERGER, Vice Chancellor.

*1 This action involves a dispute among four siblings over the control of a charitable corporation, the F.M. Kirby Foundation, Inc. (the "Foundation"). In Count I of their amended complaint, plaintiffs, Allan P. Kirby, Jr. ("Allan Kirby"), Grace K. Culbertson and Ann K. Kirby, seek a determination that they, together with their brother, defendant Fred M. Kirby, II ("Fred Kirby"), are the directors of the Foundation. Count II charges Fred Kirby with various breaches of fiduciary duty both in his management of the Foundation's assets and in his election of his wife and four children (the remaining defendants) as members of the Foundation. This is the decision on defendants' motion to dismiss Count I for failure to state a claim and plaintiffs' motion to compel production of documents.

The following is a brief description of the background of the Foundation and the actions that gave rise to this dispute, as recited in the amended complaint. The Foundation was organized in 1931 by F.M. Kirby, the grandfather of plaintiffs and Fred Kirby. It was, and remains, a non-profit corporation dedicated to religious, charitable, scientific, literary and educational purposes. The Foundation's original endowment was apparently less than $1 million; it has since grown to approximately $150 million.

The certificate of incorporation provides, in relevant part:

EIGHTH-The conditions of membership of the corporation are as follows:

1-Only individuals interested in the objects and purposes of the corporation are eligible to become members. New members of the corporation, without limit as to number, may be elected by a majority vote of the old members. A member may voluntarily withdraw from the corporation at any time. There shall be at all times not less than three members of the corporation, and if, at any time, the total membership shall fall below three members, ... the two remaining members, or the one remaining member, as soon as practicable, shall elect or select a new member or members at least sufficient to bring the total membership up to three members.... [I]n the event that there shall at any time cease to be any members of the corporation, then the executors or administrators of the last three members to have their membership terminated by death, shall elect three new members. If at the time there shall cease to be any members of the corporation, there shall not be as many as three former members whose membership was terminated by death, then the executors or administrators of the last two members or the last one member, as the case may be, to have their or his membership terminated by death, shall elect or select three new members....

* * *

2-The corporation may establish and put into effect such further rules, regulations and orders governing admission to membership, duties and obligations of members, provisions for suspension, reprimands or expulsion from membership and classification of members as the Bylaws shall from time to time provide and as shall not be inconsistent with Section 1 of this Article.

***2** Eighth Article of the Certificate of Incorporation of the F.M. Kirby Foundation.

The original members of the Foundation were F.M. Kirby and two other gentlemen who are not alleged to have been members of the Kirby family. It appears that the three original members also constituted the Foundation's board of directors. In 1940, F.M. Kirby died and his son, Allan P. Kirby, replaced him as a member and director. In 1953, Fred Kirby was elected a member and director and plaintiffs-Allan P. Kirby's other children-were elected directors.

In 1973, Allan P. Kirby died. Since the other original members of the Foundation had died at some earlier time, Allan P. Kirby's death left Fred Kirby as the sole member of the Foundation. For the next eleven years, Fred Kirby remained the sole member of the Foundation, and he and plaintiffs constituted the entire board of directors. In April, 1986, in the belief that Fred Kirby was still the sole member of the Foundation, Allan Kirby wrote to his brother and requested that each of the plaintiffs be elected members. Fred Kirby wrote back, advising his brother for the first time that he had elected his wife and four children as members several years before. Plaintiffs reacted to this news by amending the Foundation's bylaws at a June 5, 1986 special meeting of the board of directors. The resolution, which was approved over Fred Kirby's negative vote, provides:

RESOLVED that the By-laws be amended so as to provide for the Board of Directors, and only the Board of Directors, to constitute the Members of the Corporation.

Amended Complaint, ¶ 20. The effect of this bylaw, according to plaintiffs, was to make plaintiffs members and to remove from membership Fred Kirby's wife and children. Fred Kirby considered the amended bylaw invalid and of no effect. In August, 1986, he, his wife and his children held a meeting of members at which they purported to remove plaintiffs from the board of directors and elect themselves to it.

Thus, at present Fred Kirby is the only person whose status as a member and director is undisputed. Plaintiffs argue that they are members by virtue of the amended bylaw and, for the same reason, that defendants were unable to remove them as directors. Defendants argue that the amended bylaw is invalid. Therefore, either by the collective votes of Fred Kirby and his family or by Fred Kirby's vote as the sole member, plaintiffs were removed as directors in August, 1986.

The validity of the amended bylaw turns, in part, upon whether it conflicts with the certificate of incorporation. *Essential Enterprises Corp. v. Automatic Steel Prods.*, Del. Ch., 159 A.2d 288, 289 (1960); 8 *Del.C.* § 109(b). The conflict, if there is one, arises from the provisions of Section 1 of Article Eighth. That section states that "[n]ew members ... may be elected by majority vote of the old members." There must be at least three members at all times and, if there are less than three, Section 1 requires the remaining members to select a sufficient number of new members to bring the total to at least three. If there are no members, the executors of the last three people whose memberships were terminated by death are required to select three new members.

***3** Plaintiffs argue that, although Section 1 specifies two methods by which members may be selected, it does not proscribe all others. Nowhere in Section 1 is there any express restriction on the power of the board of directors to elect new members. Section 1 provides only that new members *may* be elected by old members. Plaintiffs argue that the use of the word "may" indicates that the power granted in Section 1 is non-exclusive. Moreover, Section 2 empowers the board of directors to make rules, regulations and orders governing admission to and expulsion from membership. Plaintiffs argue that, given this broad grant of power to the directors, it is entirely consistent to read Section 1 as they suggest. The amended bylaw does not preclude the members from exercising any of the powers conferred in Section 1. They may elect new members by, at the same time, electing the proposed member a director. Since the Court should attempt to reconcile the amended bylaw with the certificate, *Essential Enterprises Corp. v. Automatic Steel Prods., Inc., supra,* and such a reconciliation is possible by

reading Section 1 as non-exclusive, plaintiffs argue that it would be inappropriate to dismiss Count I.

Defendants argue that Section 1 of Article Eighth is clear and unambiguous. They say that it establishes the only methods by which a person may become a new member. The statement that new members "may" be elected by old members in no way suggests that the board of directors also may elect new members. Rather, defendants argue that the use of the word "may" merely grants the old members discretion to elect new members or not as they see fit. Defendants also contend that, if the construction advanced by plaintiffs were accepted, a significant portion of Section 1 would be superfluous. As noted above, Section 1 sets forth steps to be taken by the remaining members or the executors of deceased members to bring the total membership up to at least three if the membership falls below that level. Those provisions, they say, would be unnecessary if the directors had the power to elect new members.

In addition, defendants argue that the amended bylaw conflicts with Section 1 because it limits the number of members of the Foundation. Section 1 provides that members may elect new members "without limit as to number." However, the amended bylaw requires that members be directors and defendants assert that a pre-existing bylaw provides that there shall be six directors. Thus, indirectly, the amended bylaw limits the number of members to six.

Even if the Court were to find that the amended bylaw does not conflict with the certificate, defendants contend that the amended bylaw must be stricken as being inequitable. Relying upon such cases as *Schnell v. Chris-Craft Industries, Inc.*, Del.Supr., 285 A.2d 437 (1971), and *In re Osteopathic Hospital Ass'n of Delaware*, Del.Ch., 191 A.2d 333, *aff'd*, Del.Supr., 195 A.2d 759 (1963), defendants say that the amended bylaw gives plaintiffs absolute control over the Foundation and, thus, constitutes an egregious subversion of corporate democracy which should not be tolerated by this Court.

***4** On a motion to dismiss for failure to state a claim, all inferences must be construed in plaintiff's favor, and the motion must be denied unless the claim is clearly without merit as a matter of fact or law. *Rabkin v. Phillip A. Hunt Chemical Corp.*, Del.Supr., 498 A.2d 1099 (1985). All well pleaded factual allegations must be accepted as true, but unsupported conclusions of fact and conclusions of law are not deemed admitted. *Weinberger v. UOP, Inc.*, Del.Ch., 409 A.2d 1262 (1979). Thus, plaintiffs' allegation that the bylaw is not inconsistent with the certificate of incorporation is not deemed admitted because that allegation is a conclusion of law. On the other hand, defendants will not be able to prevail on their motion to dismiss unless the Court can determine that the amended bylaw would be invalid under any set of facts plaintiffs might be able to prove.

In deciding whether the amended bylaw conflicts with the certificate, the Court uses the rules applied to interpret statutes, contracts and other written instruments. *Hibbert v. Hollywood Park, Inc.*, Del.Supr., 457 A.2d 339 (1983). If the provisions in question are unambiguous, they must be applied as written, giving the language chosen its ordinary meaning. The provisions are ambiguous only if they are reasonably susceptible of different interpretations. The fact that the parties disagree as to the meaning of Article Eighth does not create an ambiguity. *Id.*

I agree with defendants that the use of the word "may" in Section 1 of Article Eighth is unambiguous. That section not only provides that members "may" elect new members but also goes into some detail as to what must be done if the membership drops below three. The remaining member(s) "shall" elect one or two more members, as necessary, to bring the total up to three. If there are no remaining members, then the executors of the last three members to have had their membership terminated by death, again, "shall" elect three new members.

Section 1, read as a whole, eliminates any ambiguity as to the meaning of the word "may." As a general matter, members are empowered to elect new members (i.e., they "may"), whereas under certain specified circumstances they are required to do so (they "shall"). In context, the only reasonable interpretation is that the word "may" is meant to be permissive. However, by accepting defendants' interpretation of the word "may," it does not necessarily follow that the provisions of Section 1 are exclusive and that the directors, therefore, are precluded from electing members. All that can be said on the basis of this analysis is that Section 1 does not implicitly allow for alternative methods of electing members.

The fact that Section 1 details the steps to be taken by members or their executors to correct "below minimum"

membership, likewise, does not compel the conclusion that it is exclusive. Defendants contend that it would be unnecessary to provide for the situation where there are no members or fewer than three members if the directors could correct such a circumstance themselves. However, there is no assurance that, at such a time, there would be any directors. If the directors and members are the same, as appears to have been the case at the time the Foundation was created, then, upon the death of all the members, there would be no directors. It is possible that the drafters of the certificate included the below minimum provisions in Section 1 in contemplation of such a "worst case" scenario. When viewed from this perspective, the below minimum provisions would not be superfluous even if the directors were empowered to elect members.

***5** Reading beyond Article Eighth, I find that the certificate as a whole may be reasonably read to support either side's contention. Defendants' interpretation could be viewed as being more consistent with the overall corporate structure of the Foundation. From the certificate it appears that the members generally are not involved in the day-to-day operations of the Foundation, but exercise their control over the Foundation through the election of directors and the power to make bylaws. The directors are granted broad authority to manage the affairs of the Foundation subject to the members' approval of certain substantial transactions. If the directors were also empowered to elect members, they would be able to perpetuate themselves in office by enacting the type of bylaw at issue here. Such a result, arguably, would alter the corporate structure by giving each group-the members and the directors-the power to remove and replace the other.

However, this is a non-stock charitable corporation and the members, unlike stockholders of a for-profit corporation, have no vested interest in remaining members. *Bailey v. A.S.P.C.A.*, N.Y.App.Div., 125 N.Y.S.2d 18 (1953), *aff'd*, N.Y.Ct.App., 120 N.E.2d 853 (1954). In Section 2 of Article Eighth, the certificate expressly grants the board of directors substantial control over who may become and who may remain members. The directors may adopt bylaws governing admission to membership, duties and obligations of members, classification of members and expulsion from membership. Since the directors are expressly empowered, among other things, to expel members, it would not necessarily be inconsistent with the corporate structure established by the certificate for the directors to have the corollary power of electing members.

Article Tenth would support such an expansive reading of the directors' powers. That section provides, for example:

TENTH-In furtherance and not in limitation of the powers conferred by law, the board of directors in [sic] expressly authorized:

* * *

4-In the exercise of an absolute and uncontrolled discretion, to make any and all donations, gifts, contributions and loans which the corporation may make pursuant to this certificate of incorporation, without responsibility or accountability to the members of this corporation for any such donations, gifts, contributions or loans in any respect whatever; subject, nevertheless, to the provisions of the statutes of Delaware.

Article Tenth concludes by providing that the bylaws may "confer upon the directors and officers powers and authorities additional to those expressly conferred upon them by law and by this certificate." While the provisions of Article Tenth do not directly bear on the question of the directors' power to elect members, they do confer broad powers on the directors and arguably suggest that the certificate should be read as authorizing the board to do anything not expressly prohibited by the certificate or by statute. If this analysis were accepted, plaintiffs' interpretation would be viable.

***6** Based upon the foregoing, I conclude that the certificate is ambiguous with respect to the purported power of the directors to elect members. It thus becomes necessary to apply the rules of construction to ascertain the meaning of Article Eighth in this context. The purpose of those rules is to reach a result that will give effect to the intent of the drafters, and it is appropriate to look to extrinsic circumstances in carrying out this process. *Gluckman v. Holzman,* Del.Ch., 51 A.2d 487 (1947). If plaintiffs were able to establish, for example, that the founder did not intend Article 1 of Section Eighth to be exclusive, the defense of invalidity based upon the asserted inconsistency between the amended bylaw and the certificate would fail. Accordingly, defendants' motion to dismiss on this ground is denied.

Alternatively, defendants argue that the amended bylaw impermissibly limits the total number of members and that it is inequitable. The limitation on membership argument fails because the amended bylaw, by its terms, does not set any limit on the number of directors and, thus, sets no limit on the number of members. There is, apparently, another bylaw limiting the number of directors to six. However, there is no evidence that the earlier bylaw was enacted by the members and, therefore, beyond the power of the directors to amend or repeal. Thus, if necessary to avoid a conflict with the certificate, the amended bylaw may be found to have impliedly repealed that portion of the former bylaw limiting the number of directors to six. *See Board of Assessment Review of New Castle County v. Silverbrook Cemetary Co.*, Del.Supr., 378 A.2d 619 (1977). Accordingly, dismissal is not warranted on this theory.

Defendants' equitable argument, likewise, cannot be resolved on a motion to dismiss. The complaint alleges that plaintiffs' grandfather, the founder, intended that the Foundation be run by the Kirby family through the generations. Consistent with that intent, plaintiffs and Fred Kirby were directors for more than thirty years and were the sole directors for thirteen years following their father's death. From plaintiffs' perspective, the amended bylaw does not usurp control from defendants. Rather, it preserves the joint participation of all branches of the Kirby family in the operation of the Foundation. Giving plaintiffs the benefit of all inferences to be drawn from their allegations, I am unable to conclude that the amended bylaw must be condemned as an impermissible manipulation of the corporate machinery. *Cf. Schnell v. Chris-Craft Industries, Inc., supra.* For the foregoing reasons, defendants' motion to dismiss is denied.

The remaining matter to be decided is plaintiffs' motion to compel production of fifteen documents withheld by defendants on the ground of attorney-client privilege. Eleven of the documents are communications between Fred Kirby or Robert Lindblom ("Lindblom"), the Foundation's secretary, and the law firm of Olwine, Connolly, Chase, O'Donnell and Weyher ("Olwine"), the Foundation's general counsel. Two are Olwine interoffice memoranda pertaining to the tax status of the Foundation. One is a note from Lindblom to Fred Kirby commenting on communications from Olwine pertaining to the tax status. The last is undated and consists of notes of legal matters to be discussed with Olwine. Of the fourteen dated documents, half were created before August 13, 1986-the day on which defendants attempted to remove plaintiffs as directors-and the other half were prepared after that time. All of the documents are in the Foundation's files, and plaintiffs do not question defendants' assertion that the documents satisfy the requirements of D.R.E. 502(d) or the common law requirements for the assertion of the attorney-client privilege.

*7 Defendants argue that a corporation, its officers and directors are entitled to invoke the attorney-client privilege, *Graham v. Allis-Chalmers Mfg. Co.*, Del.Supr., 188 A.2d 125 (1963), and rely on this Court's holding in *Hollingsworth v. Essence Communication, Inc.*, Del.Ch., Civil Action No. 5312, Hartnett, V.C. (July 15, 1977), to support assertion of the privilege in a § 225 proceeding. However, neither those cases nor any others cited by defendants address the question of whether the attorney-client privilege may properly be invoked by the corporation against those who were admittedly its directors at the time the documents were prepared.

As to those documents prepared prior to August 13, 1986, I am not persuaded that the attorney-client privilege may be invoked against plaintiffs. The issue is not whether the documents are privileged or whether plaintiffs have shown sufficient cause to override the privilege. Rather, the issue is whether the directors, collectively, were the client at the time the legal advice was given. Defendants offer no basis on which to find otherwise, and I am aware of none. The directors are all responsible for the proper management of the corporation, and it seems consistent with their joint obligations that they be treated as the "joint client" when legal advice is rendered to the corporation through one of its officers or directors.

Defendants argue that any rights plaintiffs might have had to privileged documents were extinguished on August 13, 1986 when they were purportedly removed from office. They point to authorities from other jurisdictions for the proposition that the statutory right to examine corporate books and records, such as that conferred by 8 *Del.C.* § 220, is lost as soon as a director leaves office. Plaintiffs' rights under § 220, whatever they may be, are irrelevant. Plaintiffs are seeking discovery in support of a colorable claim and are entitled to the documents unless they are protected from disclosure by a valid claim of privilege. As to the documents generated prior to August 13, 1986, I find that there is no basis for the invocation of the

attorney-client privilege [1] and, accordingly, that plaintiffs' motion to compel must be granted.

The documents generated after August 13, 1986 raise different considerations. Notwithstanding plaintiffs' claim that they continue to be directors of the Foundation, the fact is that corporate action was taken to remove them from office on August 13. It is reasonable to infer from the complaint that, thereafter, plaintiffs did not participate in board meetings or corporate decisions and were treated by the corporation as having no remaining interest in corporate affairs. Under these circumstances, it would indeed be a "fiction" to say that plaintiffs were the clients to whom the legal advice was rendered. Accordingly, the question is whether, by analogy to a stockholder seeking privileged documents in support of a derivative claim, plaintiffs should be allowed discovery upon a showing of good cause. *See Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir.1970), *cert denied,* 401 U.S. 974 (1971); *Moran v. Household International, Inc., et al.,* Del.Ch., Civil Action No. 7730, Walsh, V.C. (September 18, 1984). Defendants argue that plaintiffs, as former directors who "seek solely to benefit themselves at the expense of members and directors of the Foundation," should not be equated with stockholders asserting a claim on behalf of the corporation. Brief of Defendants in Opposition to Plaintiffs' Motion to Compel Documents, at 10. If defendants' characterization were accurate, their position would merit serious consideration. *See Weil v. Investment/ Indicators, Research & Management, Inc.,* 647 F.2d 18 (9th Cir.1981) (holding that the *Garner* rationale does not apply where a former stockholder seeks damages from the corporation). However, plaintiffs here are not seeking damages from the corporation and, although they may obtain a personal benefit if their claims to office are sustained, a § 225 proceeding has long been recognized as serving the interests of the corporation as a whole. *See Fleer v. Frank H. Fleer Corp.,* Del.Ch., 125 A. 411, 416 (1924) (The purpose of the statute "is to right wrongs done to a corporation, not to its individual stockholders, through the unlawful usurpation of its management and offices by persons not entitled thereto.")

***8** Inasmuch as a § 225 proceeding promotes the interests of the corporation and all of its constituents by determining those who are properly empowered to manage the corporation, I find that the analogy to a stockholders' derivative action is appropriate. As a result, plaintiffs' motion to compel documents generated after August 13, 1986 should be measured against the standards articulated in *Garner,* as appropriate:

> There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; whether the communication related to past or prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Garner v. Wolfinbarger, 430 F.2d at 1104. As *Garner* suggests, *in camera* inspection would assist the Court in deciding whether plaintiffs' interest in obtaining the documents outweighs the Foundation's privilege. Accordingly, I request that defendants submit the seven documents generated after August 13, 1986 as well as the one undated document for *in camera* review.

IT IS SO ORDERED.

All Citations

Not Reported in A.2d, 1987 WL 14862

Footnotes

1 In their brief, defendants made passing reference to a separate claim of attorney work product privilege. However, in their identification of the withheld documents in a letter dated November 20, 1986, defendants did not identify any documents as being withheld on that basis and there is no argument in the brief in support of a work product privilege. Accordingly, I assume that the only basis on which the documents have been withheld is the claim of attorney-client privilege.

End of Document

2008 WL 1926766 (Va.Cir.Ct.) (Trial Order)
Circuit Court of Virginia.
Fairfax County

RUSH,

v.

SUNRISE SENIOR LIVING, INC.

No. CL-07-11322.
February 12, 2008.

Robert W. Wooldridge, Jr., Judge.

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Dear Counsel,

This case came before me on Plaintiff's Motion to Compel Responses to Requests for Production of Documents from Defendant Sunrise Senior Living, Inc. Following a hearing, I took the matter under advisement. For the reasons that follow, I grant Plaintiff's motion in part and deny it in part; order certain documents to be produced to the Plaintiff immediately; order certain documents listed on Defendant's privilege log to be produced for an *in camera* review which will be conducted by a court-appointed Special Commissioner; and sustain and overrule certain other objections that will result in the required production of additional documents.

Background

This is a breach of contract and defamation action arising out of Defendant, Sunrise Senior Living's ("Sunrise"), termination of the employment of its CFO, Plaintiff Bradley B. Rush. Sunrise is a publicly traded Delaware corporation that is engaged in the business of development, construction, sale and operation of senior citizen assisted living communities throughout North America and Europe. Mr. Rush served as Sunrise's CFO from August 2005 until May 2007. Mr. Rush alleges that he was terminated without cause and in retaliation for, *inter alia,* his disclosure of Sunrise's improper, and in some instances fraudulent, accounting practices to the Securities and Exchange Commission (SEC). Sunrise contends Mr. Rush was fired because he violated company policies, including its policy on document retention.

Mr. Rush served his First Set of Requests for Production of Documents ("Document Requests") on Sunrise in September of 2007. Sunrise timely objected to Document Requests which seek, generally: (1) documents relating to Mr. Rush's interview with the SEC; (3) minutes of Sunrise's Board of Directors and its Special Independent Committee; (8) documents relating to Sunrise's submissions to the SEC, including the eleven page "roadmap" letter; (10) all documents created, received or maintained by Mr. Rush during his employment; (11) documents related to the Fox Hill joint venture; (12) documents relating to Sunrise's potential private buyers; (17) documents reflecting Tiffany Tomasso's travel and related expenses; (18) any computer issued by Sunrise to Mr. Rush during his employment; and (19) "objects in the shape of an acorn." Sunrise objected on the basis that the requests were irrelevant, overly broad, and sought information protected from discovery under the attorney-client privilege ("the privilege") and/or the attorney work-product doctrine. Sunrise provided Rush and the Court with a thirtypage privilege log.

Mr. Rush filed the instant Motion to Compel, disputing that his requests were irrelevant and overly broad. In addition, Mr. Rush argues that the documents listed in Sunrise's privilege log should be produced because (1) Sunrise cannot assert the privilege over documents that Rush, its former officer, previously reviewed, had access to, or even authored himself during his tenure; (2) Sunrise cannot assert the privilege over documents that provide mere business, as opposed to legal, advice; (3) Sunrise cannot cloak, and therefore shield from discovery, underlying case facts in privileged communications; and (4) Sunrise has waived the privilege by sharing so-called privileged communications with an unrelated third-party, namely its public relations firm, Robinson Lerer & Montgomery ("RLM").

In response, Sunrise argues that the documents listed in its privilege log should not be produced because (1) Rush, who is no longer an officer or director of Sunrise, is not entitled to privileged documents, even those he reviewed or created during his tenure; (2) that the documents listed in Sunrise's privilege log contain strictly legal, not merely business, advice; (3) that documents containing a mix of law and fact, such as those in Sunrise's privilege log, are still considered privileged; and (4) Sunrise did not waive its privilege by sharing privileged information with RLM. Sunrise also contends that the document requests are overly broad and not relevant to the claims and defenses in this case.

The Attorney-Client Privilege

The attorney-client privilege is one of the oldest common law privileges sanctioned by the courts. *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). When it applies, the privilege is absolute and, unlike the work product doctrine, cannot be overcome, "even for the purpose of administering justice." *Commonwealth v. Edwards,* 235 Va. 499, 508-09, 370 S.E.2d 296, 301 (1988). Its elements have been set forth in various ways, [1] but the leading privilege test in Virginia is found in *Edwards,* which provides that "confidential communications between attorney and client made because of that relationship and concerning the subject matter of the attorney's employment are privileged from disclosure." Id.

The attorney-client privilege is available to corporations. *Owens-Corning Fiberglas Corp. v. Watson,* 243 Va. 128, 141, 413 S.E.2d 630, 638 (1992) citing *Upjohn,* 449 U.S. at 389-90. The policy for extending the privilege to corporate clients is conceptually the same as for individual clients: "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn,* 449 U.S. at 389. Although the underlying policy considerations are identical, courts and commentators alike have frequently expressed concern that the privilege may be used by corporations to create a large "zone of secrecy" for communications whose probative value could be important to a fair resolution of disputes. *See, e.g., Am. Cyanamid Co.* v. Hercules Powder Co., 211 F. Supp. 85, 88 (D. Del. 1962); *see generally* David Simon, *The Attorney-Client Privilege as Applied to Corporations,* 65 Yale L.J. 953, 956 (1956). This is particularly true with regard to in-house counsel, through which corporations routinely route all business correspondence. Accordingly, "... the privilege is strictly construed to apply only where necessary to protect its underlying policy aims." *Edwards,* 235 Va. at 509, 370 S.E.2d at 301. Further "[t]he proponent [of the privilege] has the burden to establish that the attorney-client relationship existed, that the communications under consideration are privileged, and that the privilege was not waived." *Id.*

The Supreme Court of Virginia has not yet decided whether the attorney-client privilege applies against a former officer or director as to documents created during the course of his employment. However, some jurisdictions considering the issue have held that the privilege cannot be invoked against a corporation's former directors because directors are treated as the "joint client" when they receive legal advice for the corporation. *See, e.g., Gottlieb v. Wiles,* 143 F.R.D. 241, 247 (D. Colo. 1992) *rev'd on other grounds, Gottlieb v. Barry,* 43 F.3d 474 (1994) (stating that the present board of directors could not assert privilege against a former director because the situation is analogous to one where parties with a common interest retain the same attorney, but when they later become adverse, neither is allowed to claim privilege); *Kirby v. Kirby,* Civ. A. No. 8604, 1987 Del. Ch. LEXIS 463, at 18 (Del. Ch. July 29, 1987). Such cases find persuasive the fact that the former employee was already aware of the contents of the employee's own communications with counsel for the organization. At least one Virginia court of record has adopted this approach, and held, in a suit by a minority shareholder and former director and officer, that "the privilege must yield if it would violate a weightier public policy than the protection of client confidence in the attorney-client relationship." *Ostermann v. Monoflo International,* 1992 WL 884430 (Va. Cir.Ct. 1992).

In contrast, other courts uphold the privilege without limitation and refuse access by the former officer. *See, e.g., Lane v. Sharp Packaging Systems, Inc.* 640 N.W.2d 788, 803 (Wis. 2002) ("we conclude that even though Lane is a former officer and director, and the documents at issue were prepared during his tenure, Sharp can effectively assert the lawyer-client privilege against him."); *American Steamship Owners Mutual Protection and Indemnity Association, Inc. v. Alcoa Steamship Co. Inc.* 232 F.R.D. 191, 198 (S.D.N.Y. 2005) (stating that a corporate officer "can neither disseminate confidential information he has received as a Board member nor pierce the privilege to obtain additional information"). Still other courts permit access only to the former officer's own communications with counsel. *See, e.g., In re Braniff, Inc.,* 153 B.R. 941 (Bankr. M.D. Fla. 1993) (former officers and directors entitled to discovery of privileged documents prepared by, addressed to, or copied to them).

Sunrise primarily relies on the United States Supreme Court case of *Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 349 n. 5; 105 S. Ct. 1986, 1991 n. 5 (1985), contending it stands for the proposition that an individual who is now neither an officer nor a director retains no control over the corporation's privilege. But *Weintraub* is of limited applicability here. In *Weintraub,* a Chapter 7 corporate liquidation case, the Court stressed that its review was limited

to "the control of the attorney-client privilege of a corporation *in bankruptcy.*" Id. at 349; 1991 (emphasis added). The Court held that the corporate debtor's attorney-client privilege passed to the trustee due to the specialized role that a trustee plays in corporate bankruptcy cases. *Id.* at 356-57; 1995. Accordingly, the Court's suggestion in a footnote that former directors retain no control of the corporation's privilege is *dicta,* and the limited context of the Court's holding makes it less helpful here.

Professor Wigmore describes four conditions that must exist for any privilege to defeat the disclosure of communication to which adverse parties and the public otherwise have a right:
(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community out to be sedulously *fostered.*

(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation. *Garner v. Wolfinbarger,* 430 F.2d 1093, 1102-1103 (5th Cir. 1970), *cert. denied,* 401 U.S. 974 (1971), *citing* 8 Wigmore, Evidence, § 2285 at 527.

Sunrise has the burden to establish that the communications under consideration are privileged. *Edwards,* 235 Va. at 509, 370 S.E.2d at 301. Under the circumstances of this case, I find that the public policy of furthering Sunrise's "full and frank communication" with its in-house and outside counsel is outweighed by Mr. Rush's right of access to documents which he received or reviewed, authored or reasonably had access to as CFO during his tenure. Because a narrow application of the attorney-client privilege is required by law, I find that it does not apply to such documents in this case. The issue is not whether Mr. Rush may waive the privilege that Sunrise currently holds. Rather, under the circumstances presented, I find the privilege does not apply to those documents. Applying Wigmore, these were not documents that were kept confidential in relation to Mr. Rush. At the same time, the privilege may still apply to documents not reasonably accessible by Mr. Rush as CFO during his tenure, documents created outside of his tenure, and documents clearly not intended to be for his eyes even during his tenure.

I order that Sunrise immediately produce to Mr. Rush all documents Mr. Rush received, reasonably had access to as CFO, or authored himself during his tenure at Sunrise, subject to the work product doctrine ruling below. All other documents responsive to the discovery requests that Sunrise continues to maintain are privileged must be reviewed *in camera.* Because of the volume of documents involved, I am appointing Joel M. Birken as Special Commissioner to conduct such a review.

In deciding whether a document is privileged, Mr. Birken shall also determine whether the communication involves business versus legal advice, as the privilege "does not shield from discovery communications generated or received by an attorney acting in some other capacity, or communications in which an attorney is giving business advice rather than legal advice." 1 Paul R. Rice, et al., *Attorney Client Privilege in the United States,* 7.1, at 7, 11 (2d ed. 1999).

Finally, as to documents that Mr. Birken determines are privileged, that privilege may have been waived by Sunrise. I do not have sufficient evidence before me to make such a determination, nor do I impose that burden on Mr. Birken. Therefore, I will conduct a separate hearing to determine whether Sunrise, expressly or impliedly through its conduct, has waived the privilege as to those documents Mr. Birken finds are privileged.

Work Product Doctrine

The work product doctrine, first recognized in *Hickman v. Taylor,* 329 U.S. 495 (1947), is codified in Rule 4:1(b)(3) of the Rules of the Supreme Court of Virginia, which provides as follows:

> "Subject to the provisions of subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

The policy rationale of the work product doctrine is not protection of the attorney-client relationship, but rather enhancement of the integrity of the litigation process. *See Hickman,* 329 U.S. at 510-11. Accordingly, the doctrine protects documents which are prepared by an attorney "in anticipation of litigation" from discovery. *See* Va. Sup. Ct. R Rule 4:1(b)(3) (2007). Unlike the attorney-client privilege, the doctrine is qualified: it may be overcome by a showing that an opposing party has a substantial need for the materials and that the party would not be able to obtain the "substantial equivalent" without "undue hardship". *See Id.* Even where such a showing is made, however, an attorney's mental impressions, conclusions, opinions, and legal theories are still afforded special protection that is treated essentially as an absolute prohibition. *See Id.*

While mindful of this legal framework, granting or denying a request for attorney work product remains "a matter within the trial court's discretion." *Rakes v. Fulcher,* 210 Va. 542, 546 (1970) (interpreting Rule 34 of the Federal Rules of Civil Procedure, which the Court found analogous to Virginia's Rule 4:9). I decline to apply the work product doctrine in this case to documents Mr. Rush received, authored or reasonably had access to during his tenure as CFO, and order that Sunrise immediately produce to Mr. Rush all such documents, subject to the attorney-client privilege ruling above. All other documents responsive to the discovery requests that Sunrise continues to maintain are work product must be reviewed *in camera* by Mr. Birken. He shall determine whether the documents in Sunrise's privilege log were or were not "created in anticipation of litigation" (as opposed to, for example, created in the regular course of business in responding to SEC investigations and/or to its concerned shareholders).

As to documents Mr. Birken finds were created in anticipation of litigation[2] , he must also determine whether Mr. Rush has a substantial need for the documents and whether Mr. Rush is unable without undue hardship to obtain their substantial equivalent by other means. I generally find, and direct Mr. Birken to consider, that as between these parties Sunrise has exclusive possession of these documents, and Mr. Rush has a seemingly substantial need for and little other means of obtaining them. However, Rule 4:1(b)(3) further provides that even when a substantial need is established, the mental impressions, conclusions and opinions or legal theories of an attorney are not discoverable. In the event he finds that substantial need and undue hardship are established, Mr. Birken must nonetheless exclude from production those impressions, conclusions, and legal opinions of Sunrise's counsel.

Relevancy

Mr. Rush contends, and Sunrise disputes, that the contested document requests are relevant to the claims and defenses in this case and are not overly broad. In that regard, this discovery dispute is like many faced by trial courts, where each side seeks to expand or limit discovery depending on its view of the case. Mr. Rush contends that he was fired because of information he provided to the SEC concerning Sunrise's finances. Sunrise contends that Mr. Rush was fired because he failed to comply with various company policies (e.g., document retention). Sunrise seeks to preclude the production of

financial information because, it says, such information is irrelevant to Mr. Rush's firing; Mr. Rush contends it is part and parcel of the reason for his termination.

I have analyzed the relevance and breadth of Mr. Rush's document requests as required by Rule 4:1(b)(1). In so doing, I have considered whether the documents sought are relevant to any claim or defense, or are reasonably calculated to lead to the discovery of admissible evidence; whether production would be unduly burdensome or expensive, given the amount at issue, the parties' resources and the importance of the issues at stake; and whether the documents may be more conveniently or inexpensively obtained from some other source.

As to the objections of relevancy and over breadth, I find as follows.

As to Request No. 1, I overrule the objection except as to the first portion of section (4), to which the objection is sustained.

As to Request No. 3, I overrule the objection.

As to Request No. 8, I overrule the objection.

As to Request No. 10, I sustain the objection to the general portion of the Request. However, as to the specific requests in Request No. 10, I overrule the objection to sections (1), (2), (3) and (4) and sustain the objection to section (5).

As to Request No. 11, I overrule the objection.

As to Request No. 12, I sustain the objection.

As to Request No. 17, I sustain the objection.

As to Request No. 18, I overrule the objection.

As to Request No. 19, I sustain the objection.

Conclusion

For those reasons, Mr. Rush's motion is granted in part and denied in part. Plaintiff's counsel shall prepare an order reflecting this ruling and incorporating this opinion letter, and forward it to defense counsel for review and endorsement. I am placing the matter on my docket for February 15, 2008 at 9:00 a.m. for entry of the order.

Very truly yours,

<<signature>>

Robert W. Wooldridge, Jr.

Cc: Joel M. Birken, Esq.

Footnotes

1 *See, e.g., U.S. v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 338-39 (1950) (stating that the privilege applies where "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is the member of the bar of court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal preceding, and not (d) for the propose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.").

2 Mr. Birken shall order that documents created exclusively in anticipation of litigation between Sunrise and Mr. Rush shall not be produced.

End of Document

2000 WL 486961
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

Patricia KOWALONEK,
v.
BRYANT LANE, INC.

No. CV 960324942S.
|
April 11, 2000.

MEMORANDUM OF DECISION

MORAGHAN.

*1 Patricia Kowalonek, alleges in this proceeding that she suffered personal injuries caused by the negligence of the defendant on April 10, 1990. Attorney James J. Farrell (Farrell), the plaintiff's brother, was her counsel of record in the tort action for personal injury initially brought in the United States District Court for the District of Connecticut. The plaintiff asserts that the federal court dismissed her action on May 4, 1993, and Farrell brought the present action in the Superior Court on May 16, 1994.

On October 4, 1995, the plaintiff filed a grievance with the Statewide Grievance Committee against Farrell. She claimed that Farrell failed to file a pretrial memorandum thereby causing the dismissal of her action in the federal court; that he never communicated to her the fact of the dismissal or any attempt to reinstate the action; and, that as late as April 3, 1995, Farrell still led her to believe that her case was pending before the federal court. A formal hearing on the record was held on April 3, June 5 and November 14, 1996. [1] On August 26, 1996, the court granted Farrell's motion to withdraw his appearance and the plaintiff has subsequently retained new counsel.

The defendant gave notice to the plaintiff to depose Farrell on November 16, 1999. The plaintiff filed a motion to quash and a motion for a protective order on November 8, 1999. The two motions are identical in wording and neither is accompanied by a memorandum of law.

The plaintiff makes the following argument in her motions:

> that any information Farrell obtained from her regarding her personal injury case here and her other injuries or other cases was done pursuant to their attorney-client relationship; the intended deposition of Farrell would violate the attorney-client privilege and her right to privacy regarding her communications with Farrell as he would inevitably disclose confidential information that she provided him in the process of obtaining legal advice; that the deposition would require Farrell to violate rules or codes of professional duties and ethics; and that her private communications with her former attorney were protected from discovery as the attorney's work product.

The defendant argues that the plaintiff has waived her attorney-client privilege she may be otherwise entitled to by prosecuting her complaint and testifying, on the record, against her former attorney in the state grievance hearings, the transcript and record of which is available to the public. The defendant argues that at the hearings regarding whether Farrell failed in his professional duties of adequate communication and due diligence both the plaintiff and Farrell testified to matters that went to the heart of their attorney-client relationship. Their testimonies detailed their communications with regard to the preparation of discovery response, analysis of liability and damage issues, settlement positions, and the eventual breakup of their attorney-client relationship.

*2 He continues by asserting that the testimony given by the plaintiff and Farrell has a direct bearing on the defense: that at the hearings regarding his alleged lack of communication and due diligence, Farrell alleged in narration or cross-examination of the plaintiff that he had numerous telephone communications with the plaintiff regarding his reservations and reluctance to represent her; that she "wanted to perjure herself in her

discovery information," some of her injuries alleged in the present case may be an aggravation of a preexisting injury concealed from him, and some of her medical bills did not appear to be "related strictly to this particular accident";[2] that her injuries may be the direct result of her overweight and that her claim against the defendant may lack credibility;[3] that she failed to provide him with adequate information regarding her preexisting injuries;[4] and that some of her damages from loss of earnings may be in fact caused by her discharge by her employer due to excessive absenteeism .[5]

"Except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book, privilege shall be governed by the principles of the common law." Connecticut Code of Evidence § 5-1.

"The attorney-client privilege applies to communications:

> (1) made by a client; (2) to his or her attorney; (3) for the purpose of obtaining legal advice; (4) with the intent that the communication be kept confidential." *Pagano v. Ippoliti,* 245 Conn. 640, 649 (1998). "In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice." *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co.,* 249 Conn. 36, 52 (1999). In the seminal case of *United States v. United Shoe Machinery Corp.,* 89 F.Sup. 357, 358-59 (D.Mass.1950), Judge Wyzanski stated the conditions under which the attorney-client privilege is applicable: "The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *United States v. United Shoe Machinery Corp., supra.*

However, "the attorney-client privilege is strictly construed because it 'tends to prevent a full disclosure of the truth in court ...' *Turner's Appeal,* 72 Conn. 305, 318 (1899)." *Ullmann v. State,* 230 Conn. 698, 710-11 (1994). "[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures-necessary to obtain informed legal advice-which might not have been made absent the privilege." (Emphasis in original; internal quotation marks omitted.) *Ullmann v. State, supra,* 713.

***3** "A client may ... by his actions impliedly waive the privilege or consent to disclosure." "[I]t is the client's responsibility to insure continued confidentiality of his communications." *In re Von Bulow,* 828 F.2d 94, 101 (2d Cir.1987). "The power to waive the attorney-client privilege rests with the client or with his attorney acting with his authority. C. McCormick, Evidence (4th Ed.1992) § 93; see also *Doyle v. Reeves,* 112 Conn. 521, 523 (1931) (communications relevant to legal advice privileged until client waives protection) ... [O]nce the confidence protected has been breached, the privilege has no valid continuing office to perform." *In re Von Bulow, supra; Gebbie v. Cadle Co.,* 49 Conn.App. 265, 274 (1998). "Statements made in the presence of a third party are usually not privileged because there is no reasonable expectation of confidentiality." (Internal quotation marks omitted.) *Ullmann v. State, supra,* 711; see also *Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414, 1424 (3d Cir.1991) ("it is well-settled that when a client voluntarily discloses privileged communications to a third party, the privilege is waived"); *In re Grand Jury Proceedings Oct. 12, 1995,* 78 F.3d 251, 254 (6th Cir.1996) (mere fact of disclosure of specific confidential information to third party constitutes waiver; form and purpose of disclosure irrelevant); *United States v. Massachusetts Institute of Technology,* 129 F.3d 681, 684, 686-87 (1st Cir.1997) (noting that federal courts have generally held that "any voluntary disclosure outside the magic circle constitutes waiver," the circle including "secretaries, interpreters, counsel for a cooperating co-defendant, a parent present when a child consults a lawyer." Courts have generally been unwilling to make new exceptions.

In addition, "[t]he privilege protects only confidential communications of the client to the attorney," or "client communications." (Emphasis in original.) *Industrial*

Clearinghouse v. Browning Manufacturing Division of Emerson Electric Co., 953 F.2d 1004, 1007 (3d Cir.1992). "A communication from an attorney to a client, in contrast to a communication from a client to an attorney, is normally not within the privilege, unless the attorney's statement directly or indirectly reveals confidential information disclosed to the attorney by the client, or is 'inextricably linked' with the giving of legal advice." (Emphasis in original.) *Ullmann v. State, supra.* "[The attorney-client privilege] does not protect against discovery of underlying facts from their source merely because those facts have been communicated to an attorney." (Internal quotation marks omitted.) *Industrial Clearinghouse v. Browning Manufacturing Division of Emerson Electric Co., supra.* In *In re Grand Jury Proceedings Oct. 12, 1995, supra,* 252-53, the court of appeals affirmed the district court's holding that the owner and president of a laboratory had waived the laboratory's attorney-client privilege by "revealing the substance of their attorney's advice" when they told two government investigators that they had given "a detailed description of the marketing plan" to a Medicaid attorney, and that the attorney had "no problem" with several "specific elements of the plan." In the *Gebbie* case, involving an action for specific performance of a mortgage contract, the plaintiff's attorney, Block, had earlier testified in a pretrial deposition, as to the plaintiff's understanding of the contract subject matter. *Gebbie v. Cadle Co., supra.* At trial, the defendant called the plaintiff's attorney to testify as to the subject matter. "The plaintiff objected to Block's testimony in any form, asserting that he would not waive his attorney-client privilege ... In response, the defendant argued that the privilege had already been waived by the client's failure to assert it during the deposition and may not be resurrected." The Appellate Court agreed with the defendant that because the plaintiff's attorney "answered the same question, without objection, during his pretrial deposition, the attorney-client privilege had been waived and, therefore, he could not invoke the privilege as a shield to the questioning during trial ." The court concluded that even though the question posed to the plaintiff's lawyer "went to the heart of the communication between the client and attorney," "the privilege was no longer in effect" because it had been "previously waived." *Gebbie v. Cadle Co., supra,* 273-74.

***4** By contrast, some courts have ruled that a party has not waived its attorney-client privilege where the disclosure is unspecific or unsubstantial. In *United States v. White,* 887 F.2d 267, 270-71 (D.C.Cir.1989), the court ruled that one of the defendants had not waived his attorney-client privilege when he told government investigators that his attorneys "had thoroughly reviewed the decision ... after ... looking at the matter from nine different ways." The court called the defendant's discussion with the investigators about his lawyer's advice an "undetailed assertion." It held that "[a] general assertion lacking substantive content that one's attorney has examined a certain matter is not sufficient to waive the attorney-client privilege." In *In re Dayco Corp. Derivative Securities Litigation,* 99 F.R.D. 616, 619 (S.D.Ohio 1983), the court held that the defendant corporation had not waived its attorney-client privilege when its special review committee released the findings of a report, because it "did not release a 'significant part' " of the report and it "did not summarize evidence found in the report ..." In *Dayco,* "[n]either the facts which led to [the] conclusions, nor the Report itself, were released." See also *In re Grand Jury Proceedings Oct. 12, 1995, supra,* 78 F.3d 254 ("Unlike the litigants in *White* and *Dayco,* the owner and president of the laboratory ... did not merely assert that their attorney had looked into the matter; they told the investigators that they had described the specific programs in detail and that the attorney approved some parts of the plan and recommended they discontinue other parts").

"The 'at issue,' or implied waiver, exception [to the attorney-client relationship] is invoked ... when a party specifically pleads reliance on an attorney's advice as an element of a claim or defense, *voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the attorney-client relationship.* In those instances the party has waived the right to confidentiality by placing the content of the attorney's advice directly at issue because the issue cannot be determined without an examination of that advice." (Emphasis added; citations omitted.) *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co., supra,* 52-53; see also *Kantaris v. Kantaris,* 169 N.W.2d 824, 830 (Iowa 1969) (testimony concerning attorney-client communication waived privilege). "[I]t has been established law for a hundred years that when the client waives the privilege by testifying about what transpired between her and her attorney, she cannot thereafter insist that the mouth of the attorney be shut. *Hunt v. Blackburn,* 128 U.S. 464, 470-71, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888)." *In re Von Bulow, supra,* 101-02; see also *Beckett v. State,* 355 A.2d 515, 521 (Md.Ct.Spec.App.1976) (client's

decision to call attorney as witness waived attorney-client privilege); *International Tel. & Tel. Corp. v. United Tel. Co. of Florida,* 60 F.R.D. 177, 185-86 (M.D.Fla.1973) ("if the client or his attorney at his instance takes the stand and testifies to privileged communications in part this is a waiver as to the remainder ... about the same subject"); *Industrial Clearinghouse v. Browning Manufacturing Division of Emerson Electric Co., supra* ("if a complaint against an attorney, or the attorney's response or testimony in the malpractice case, reveals confidential client communications, the client waives the privilege as to the subject matter of the disclosed communications"). "The confidentiality of a client's communications may be compromised either through the publication of evidence of attorney statements or documents that disclose the client's confidential communications." *Industrial Clearinghouse v. Browning Manufacturing Division of Emerson Electric Co., supra.*

***5** Fairness concerns underlie courts' holding that voluntary disclosure of once-privileged communications constitutes waiver of the attorney-client privilege as to the disclosed communications. "Because the attorney-client privilege inhibits the truth-finding process, it has been narrowly construed ... and courts have been vigilant to preserve litigants from converting the privilege into a tool for selective disclosure. See [8 J. Wigmore, Evidence] § 2327; *United States v. Woodall,* 438 F.2d 1317 (5th Cir.1970) (en banc), cert. denied, 403 U.S. 933, 91 S.Ct. 2262, 29 L.Ed.2d 712 (1971); *In re Penn Central Commercial Paper Litigation,* 61 F.R.D. 453, 464 (S.D.N.Y.1973); *Green v. Grapo,* 181 Mass. 55, 62 N.E. 956, 959 (1902) (Holmes, J.) ('the privacy for the sake of which the privilege was created was gone by the appellant's own consent, and the privilege does not remain in such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice').

The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit." "[T]he attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality." *Permian Corp. v. United States,* 665 F.2d 1214, 1219-22 (D.C.Cir.1981). "A client cannot waive that privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial." *In re Subpoenas Duces Tecum,* 738 F.2d 1367, 1370 (D.C.Cir.1984); see also *In re von Bulow, supra.*

Primarily out of concerns for fairness, a vast majority of federal courts have rejected, refused or declined to follow, the "selective waiver" [6] doctrine fashioned by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith,* 572 F.2d 596, 611 (8th Cir.1977) (en banc). See *United States v. Massachusetts Institute of Technology,* 129 F.3d 681 (1st Cir.1997); *In re Steinhardt Partners,* 9 F.3d 230 (2d Cir.1993); *Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d. 1414 (3d Cir.1991); *In re Weiss,* 596 F.2d 1185 (4th Cir.1979); *In re Martin Marietta Corp.,* 856 F.2d. 619 (9th Cir.1988), cert. denied, 490 U.S. 1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989); *Permian Corp. v. United States, supra,* 665 F.2d 1214; *In re Sealed Case,* 676 F.2d 793 (D.C.Cir.1982); *In re Subpoena Duces Tecum, supra; Genentech, Inc. v. United States International Trade Commission,* 122 F.3d 1409 (Fed.Cir.1997). Under the "selective waiver" theory, a client who has disclosed privileged communications to one person may, in certain circumstances, continue to assert the privilege against other persons. In *Diversified,* the Eighth Circuit held that the disclosure of protected materials to the Securities and Exchange Commission during the course of a formal investigation constituted only a selective waiver of the privilege, and, consequently, the materials were not subject to discovery in subsequent civil litigation. See *Diversified Industries, Inc. v. Meredith, supra.* [7] In expanding its departure from traditional waiver doctrine, the court assumed that a contrary holding would discourage cooperation with government investigators; a rationale thoroughly rejected by the *D.C. Circuit in Permian Corp. v. United States, supra,* 1220-22.

***6** As to the scope of waiver, specifically, whether waiver of disclosed communications extends to the subject matter areas related to the disclosed communications, the views of the Sixth and the Second Circuits are representative. In *In re Grand Jury Proceedings Oct. 12, 1995, supra,* 255-56, the Sixth Circuit declines to adopt a blanket holding that voluntary disclosure of the content of a privileged communication constitutes a waiver of the privilege as to all other such communication on the same subject matter. The court provides two reasons. First, because "subject matter can be defined broadly or narrowly," it is inappropriate to adopt a blanket approach. *Id.*

Second, the court "must be guided by fairness concerns" in determining whether a specific disclosure amounts to a complete disclosure. *Id.*, citing *In re Dayco Corp. Derivative Securities Litigation, supra,* 99 ("Generally, waiver of a privilege occurs when actions by the holder would make it unfair to insist that the privilege still exists") (emphasis added); *In re Von Bulow, supra,* ("Applying the fairness doctrine, we hold therefore that the extrajudicial disclosure of an attorney-client communication-one not subsequently used by the client in a judicial proceeding to his adversary's prejudice-does not waive the privilege as to the undisclosed portions of the communications") (emphasis added).

The Second Circuit holds in *In re Von Bulow, supra,* 103: "Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential. The cat is let out of the bag, so to speak. But related matters not so disclosed remain confidential. Although it is true that disclosures in the public arena may be 'one-sided' or 'misleading,' so long as such disclosures are and remain extrajudicial, there is no legal prejudice that warrants a broad court-imposed subject matter waiver. The reason is that disclosures made in public rather than in court-even if selective-create no risk of legal prejudice until put at issue in the litigation by the privilege-holder." (Emphasis in original.)

It should be noted, first, that even if the attorney-client privilege were otherwise applicable in this case, not all the communications between the plaintiff and Farrell would be protected by the privilege. That is because only those communications made in the course of obtaining and giving legal advice and with the intent that the communications be kept confidential are privileged. See *Pagano v. Ippoliti, supra.* "The burden rests on the person invoking the privilege to establish the elements required for its application." *State v. Hanna,* 150 Conn. 457, 466 (1963); and *Turner's Appeal, supra,* 317. "A communication from attorney to client solely regarding a matter of fact would not ordinarily be privileged, unless it were shown to be inextricably linked to the giving of legal advice." *State v. Ullmann, supra,* 713. Even where the attorney-client privilege is not deemed to have been waived, "[a]n attorney does not have a privilege not to testify against his client" on matters not inextricably linked to the giving of legal advice. See *Ullmann v. State, supra,* 712 ("The fact that an attorney may not disclose privileged communications between himself and his client does not affect his capacity and his duty to testify as to other matters when called on to do so"); *Gebbie v. Cadle Co., supra,* 274-75 ("We do not take issue with the calling of [the plaintiff's attorney] to be deposed per se because it is the duty of a lawyer to testify as to other matters when called to do so") (internal quotation marks omitted). However, "courts have been reluctant to allow attorneys to be called as witnesses in trials in which they are advocates." *Ullmann v. State, supra,* 716-18 n. 15. The judicial antipathy also applies to testimony by a party's former attorney. Courts therefore balance the need for the client to have confidence in seeking legal advice and for the fact-finder to get the truth by qualifying an attorney's obligation to testify for his adversary to matters of reasonable necessity. *Loomis v. Norman Printers Co.,* 81 Conn. 343, 350 (1908).

*7 Because "[n]ot every communication between attorney and client falls within the privilege," which protects only such disclosures as are necessary to obtain "informed legal advice"; *Ullmann v. State, supra,* 713; the plaintiff in this case needs to distinguish communications made in obtaining and giving legal advice and those that were not so made in order to meet her burden as claimant of the privilege to establish the elements required for its application. See *State v. Hanna, supra.* Since Farrell was also the plaintiff's brother during the course of their attorney-client relationship, he could have acquired information regarding the plaintiff's physical conditions and preexisting injuries by observation or non-privileged communication, which was not derived from their attorney-client relationship. Such information or communications not necessary to obtain informed legal advice and with no expectation of confidentiality are not privileged. See *Ullmann v. State, supra.* Having asserted a blanket privilege claim to all her communications with Farrell, the plaintiff has failed to meet her burden of distinguishing communications made strictly for the purpose of obtaining legal advice from those made outside the attorney-client relationship. She has failed, therefore, to establish the elements required for the application of the privilege.

However, even under the assumption that all the communications disclosed at the state grievance hearings are otherwise privileged, the plaintiff has waived the privilege as to those disclosed communications because the disclosure by both parties was made on the record and their testimonies have been published in the three volumes

of transcripts attached to the defendant's memorandum of law. See *Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co., supra,* 53 (party waives privilege when she "voluntarily testifies regarding portions of the attorney-client communication, or specifically places at issue, in some other manner, the attorney-client relationship"); *Ullmann v. State, supra,* (no privilege if no expectation of confidentiality); *Gebbie v. Cadle Co., supra,* (plaintiff could no longer invoke privilege as shield at trial after he raised no objection and allowed his attorney to testify at pretrial deposition, having thereby waived privilege); *In re Von Bulow, supra,* ("Matters actually disclosed in public lose their privileged status because they obviously are no longer confidential"); *In re Grand Jury Proceedings Oct. 12, 1995, supra,* (mere disclosure of confidential information to third party constitutes waiver; form and purpose of disclosure irrelevant; finding waiver where disclosure was specific, detailed or substantial); *Industrial Clearinghouse v. Browning Manufacturing Division of Emerson Electric Co., supra,* (client waives privilege as to subject matter of disclosed information if complaint against attorney and attorney's response or testimony in separate malpractice action reveal confidential client communications).

***8** The communications disclosed at the grievance hearings were substantial, detailed and specific regarding the merits and strategies of the plaintiff's personal injury case. The disclosed communications go to the heart of the attorney-client relationship between the plaintiff and Farrell. They are also essential to the defense, especially those on the plaintiff's preexisting injuries, her falsely claimed medical bills, and her intention to perjure herself as alleged by Farrell. Once the plaintiff has publicly breached the attorney-client privilege and forced Farrell to testify as to the detailed and substantial confidences otherwise protected by the privilege, and the disclosed communications in the form of transcripts are openly available to the public, "the privilege has no valid continuing office to perform." (Internal quotation marks omitted.) See *Gebbie v. Cadle Co., supra.*

The court also finds waiver for fairness reasons. The plaintiff should not be permitted to "pick and choose among [her] opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to the communications whose confidentiality [she] has already compromised for [her] own benefit." *Permian Corp. v. United States, supra,* 1219; see also *In re Subpoena Duces Tecum, supra,* ("A client cannot waive that privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial"); *In re Von Bulow, supra,* ("it has been established law for a hundred years that when the client waives the privilege by testifying about what transpired between her and her attorney, she cannot thereafter insist that the mouth of the attorney be shut").

Even the "selective waiver" theory fashioned by the Eighth Circuit in *Diversified Industries, Inc. v. Meredith, supra,* which other federal courts of appeals have largely rejected or declined to follow; see *United States v. Massachusetts Institute of Technology,* 957 F.Sup. 301, 304 (D.Mass.1997); which is not applicable to this case because *Diversified* involves an entirely different fact pattern and rationale. The court concluded in *Diversified* that because the corporate defendant voluntarily "disclosed these documents in a separate and *nonpublic* SEC investigation ... only a limited waiver of the privilege occurred." (Emphasis added.) *Diversified Industries, Inc. v. Meredith, supra,* 572. By contrast, the plaintiff in the present case knowingly disclosed communications on the record that is accessible to the public. In addition, the policy concerns in *Diversified* (namely, a contrary holding would discourage cooperation with government investigators); see *id.;* are not present in this case because the plaintiff had not voluntarily disclosed any information to the government in connection with a government investigation of herself.

***9** In comparison, in a case somewhat similar to the present one, in which the defendant corporation had sued its former counsel in a separate malpractice action and then claimed the protection of attorney-client privilege in the unrelated contract dispute case, the Fifth Circuit opines in *Industrial Clearinghouse, Inc. v. Browning Manufacturing Division, supra,* that "if a complaint against an attorney, or the attorney's response or testimony in the malpractice case, reveals confidential client communications, the client waives the privilege as to the subject matter of the disclosed communications." [8]

As to the scope of waiver, it is limited to what the plaintiff and Farrell have actually disclosed on the record in the grievance hearings unless it would be unfair not to extend waiver to related areas where incompleteness of disclosure would be used by the plaintiff in the present case to the

defendant's disadvantage. See *In re Grand Jury Proceeding Oct. 12, 1995, supra,* 256; *In re Von Bulow, supra.* The court should determine the issue of extending waiver to related areas on an instance-by-instance basis, guided by fairness principles in deciding whether a specific disclosure amounts to a complete disclosure. See *In re Grand Jury Proceeding Oct. 12, 1995, supra,* 256.

The plaintiff also claims work product privilege to resist deposition of Farrell, arguing alternatively that the communications between her and Farrell disclosed at the grievance hearings are Farrell's work product. "The work product rule protects an attorney's interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs and countless other tangible and intangible items ... Work product can be defined as the result of an attorney's activities when those activities have been conducted with a view to pending or anticipated litigation." (Citations omitted; internal quotation marks omitted.) *Ullmann v. State, supra;* see also *United States v. Nobles,* 422 U.S. 225, 237, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). "The logic behind the work product doctrine is that opposing counsel should not enjoy free access to an attorney's thought processes." "[T]he doctrine grants counsel an opportunity to think or prepare a client's case without fear of intrusion by an adversary." (Internal quotation marks omitted.) *In re Steinhardt Partners, supra,* 234. However, "[o]nce a party allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears. Courts therefore accept the waiver doctrine as a limitation on work product protection. The waiver doctrine provides that *voluntary* disclosure of work product to an *adversary* waives the privilege as to other parties." (Emphasis added.) *In re Steinhardt Partners, supra,* 235. A party's "conscious disregard of the possibility that an adversary would gain access to the [work-product] material" waives the protection of the work product doctrine. (Internal quotation marks omitted.) *Westinghouse Electric Corp. v. Republic of the Philippines, supra,* 1428, citing therein *In re John Doe,* 662 F.2d 1073, 1081 (4th Cir.1981). In circumstances where a party cannot reasonably expect to limit the future use of the otherwise protected material, and discloses work product materials, she waives the work product privilege. *Westinghouse Electric Corp. v. Republic of the Philippines, supra.*

***10** A party's "unilateral testimonial use of work-product materials" is like her electing "to testify on [her] own behalf and thereafter assert [her] Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination," both tactics being equally impermissible. *United States v. Nobles, supra,* 239-40. "Fairness and consistency require that appellants not be allowed to gain the substantial advantages accruing to voluntary disclosure of work product to one adversary ... while being able to maintain another advantage inherent in protecting that same work product from other adversaries." Such "selective disclosure" is "often spurred by considerations of self-interest." *In re Subpoenas Duces Tecum, supra.* Farrell's statements, correspondence, mental impressions, personal beliefs, briefs and memoranda conducted or formed with a view to the plaintiff's pending personal injury action may qualify as Farrell's work product in that action. See *Ullmann v. State, supra.* However, the plaintiff has waived any protection from discovery or deposition she may otherwise have under the work product doctrine when she disclosed Farrell's work product on record at the hearings because of her "conscious disregard of the possibility that an adversary would gain access to the [work product] material" in circumstances where she "[could not] reasonably expect to limit the future use of the otherwise protected material." See *Westinghouse Electric Corp. v. Republic of the Philippines, supra.* Because the testimony by both the plaintiff and Farrell on the record, and accessible to the public, allows the plaintiff's adversaries to share the otherwise privileged work product, and the defendant has actually acquired the disclosed work product, the plaintiff has waived any protection from discovery or deposition with regard to the disclosed work product. If the plaintiff's adversaries "enjoy free access" to her former attorney's thought processes, "the logic behind the work product doctrine" is no longer tenable and the plaintiff is not entitled to the protection afforded by the doctrine. By publicly disclosing her attorney's work product in connection with her pending case, allowing her adversaries, including Farrell and the defendant, to share the otherwise privileged Farrell's thought processes, "the need for the privilege disappears." See *In re Steinhardt Partners, supra.*

In addition, fairness principles require that the plaintiff here "not be allowed to gain the substantial advantage accruing to voluntary disclosure of work product to one adversary ... while being able to maintain another advantage inherent in protecting that same work product from other adversaries." See *In re Subpoenas Duces*

Tecum, supra. Having voluntarily disclosed otherwise protected work product to her adversaries, for whatever advantages or self-interest accruing to her action against her attorney, the plaintiff "can no more advance the work product doctrine to sustain a unilateral testimonial use of work-product materials than [she] could elect to testify in [her] behalf and thereafter assert [her] Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination." See *United States v. Nobles, supra,* 239-40. The plaintiff has also made a motion for a protective order, presumably under Practice Book § 13-5, which provides, inter alia, that "[u]pon motion by *a party from whom discovery is sought,* and *for good cause shown,* the judicial authority may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense ..." (Emphasis added.)

***11** The language of § 13-5 "indicates that a protective order functions only to protect a party from being deposed." (Emphasis added.) *Cahn v. Cahn,* 26 Conn.App. 720, 727, 603 A.2d 759 (1992), affd, 225 Conn. 666, 626 A.2d 296 (1993). Here, the defendant seeks to take the deposition of Farrell, a nonparty in the present action, and Farrell, from whom discovery is sought, has neither made a motion to quash nor a motion for a protective order. It seems that the plaintiff does not have standing to move for a protective order under the Practice Book.

Nevertheless, the Appellate Court in *Cahn* ruled that a motion for protective order filed by the plaintiff to prevent the deposition of three nonparty witnesses for the defendant, because of "undue burden" on the plaintiff of having to travel to New York to attend a deposition there, was proper even in light of the language of Practice Book § 13-5. The court reasoned: "The basis for the protective order in this case was to protect the plaintiff from the 'undue burden' of having to attend a deposition in New York, which is a valid reason under Practice Book [§ 13-5]. Although the discovery being sought by the defendant was not from the plaintiff, the protective order was necessary to protect a party's interest." The *Cahn* court also noted that the Supreme Court in *Lougee v. Grinnell,* 216 Conn 483, 487 n. 3 (1990), "apparently followed rule 26(c) of the Federal Rules of Civil Procedure, which provides for protective orders for parties and nonparties" in reviewing a nonparty's attempt to obtain a protective order from being deposed in Connecticut for a case arising out of Texas. *Cahn v. Cahn, supra.*

However, even if the plaintiff here has standing to move for a protective order, she bears the burden of showing good cause why a protective order should be issued. Practice Book § 13-5; *Babcock v. Bridgeport Hospital,* 251 Conn. 790, 848-49 (1999), citing *Ballard v. Herzke,* 924 S.W.2d 652, 658 (Tenn.1996) (party seeking protective order bears burden of justifying confidentiality of each and every document sought to be protected); *Sabanosh v. Durant,* Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. 054525, 21 CONN.L.RPTR. 213 (December 17, 1997) (Flynn, J.) (mandating showing of good cause for protective order to issue). The plaintiff has failed to meet that burden. Because the testimonies by both the plaintiff and Farrell are publicly available, the plaintiff has waived any privilege she may otherwise have under either the attorney-client privilege or the work product doctrine. Therefore, it is pointless for her to seek a protective order for confidentiality where there is none. See *Lathouris v. Slavitt,* Superior Court, judicial district of Stamford/ Norwalk at Stamford, Docket No. 169137 (October 13, 1999) (DAndrea, J.) (denying motion for protective order for defendants' failure to show good cause). In addition, "[p]rotective orders have been denied where the information sought is material to the litigation." Here, the information sought is clearly material to the litigation because the information with regard to her alleged failure to report preexisting injuries, her attempt to perjure herself in her discovery information, her submission of false medical bills, and her false claim of damages from loss of earning is essential to the defense. The motion for a protective order cannot, therefore, be favorably entertained.

***12** The motion for protective order, and the motion to quash the notice of deposition are, accordingly, denied.

All Citations

Not Reported in A.2d, 2000 WL 486961

Footnotes

1 The defendant claims that the Statewide Grievance Committee eventually dismissed the plaintiff's complaint against Farrell. (Memorandum in opposition to motions for protective order and to quash, p. 7.) The record here contains no evidence of the Committee's disposition.

2 (Transcript of Statewide Grievance Committee, April 3, 1996, pp. 24-25, 27, 65, 71-72.)

3 (Transcript pp. 45-46.)

4 (Transcript, June 5, 1996, p. 20.)

5 (Transcript, November 14, 1996, p. 64.)

6 While many courts use the two terms interchangeably, the Third Circuit distinguishes "selective waiver" of the attorney-client privilege from "partial waiver." "Selective waiver permits the client who has disclosed privileged communications to one party to continue asserting the privilege against other parties. Partial waiver permits a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications." *Westinghouse Electric Corp. v. Republic of the Philippines,* 951 F.2d 1414, 1423 n. 7 (3d Cir.1991). "When a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary. See, for example, *In re Von Bulow,* 828 F.2d 94 (2d Cir.1987). If partial waiver does disadvantage the disclosing party's adversary by, for example, allowing the disclosing party to present a one-sided story to the court, the privilege will be waived as to all communications on the same subject." *Id.,* 1426 n. 12.

7 The Eighth Circuit spent only one brief paragraph, in a lengthy opinion devoted to other issues, on its selective waiver theory, which is limited to a company's voluntary disclosure to a government agency in cooperation with a formal investigation of the company by the government. See *Diversified Industries, Inc. v. Meredith, supra,* 572 F.2d 611.

8 In that case, the court of appeals noted that neither the plaintiff, nor the U.S. magistrate who first heard and decided on the motion, nor the district court specified one single instance of client's communications that was revealed by the defendant's complaint filed with the trial court. *Industrial Clearinghouse, Inc. v. Browning Manufacturing Division, supra,* 1007. On the basis of that finding, the court ruled that the "mere institute of suit" by the defendant against its former counsel, without having revealed any confidential client communications, had not waived the attorney-client privilege. *Id.*

End of Document

EXHIBIT C

From: Jeff Fuhrman [jfuhrman@llbhpwm.com]
Sent: Monday, December 15, 2014 11:06 PM
To: Bill Loftus
Cc: Bill Lomas; Jim Pratt-Heaney; Kevin Burns; David R. Lagasse
Subject: Re: New Partnership Agreement

No problem.

By copy I've included Dave's email address. His phone number is 212-692-6743.

Sent from my iPad

> On Dec 15, 2014, at 7:30 PM, Bill Loftus <bloftus@llbhpwm.com> wrote:
>
> Jeff ,
>
> Thank You ! Please provide Dave's contact information . I know Bill would like to have it
>
> Best
> Bill
>
> Sent from my iPhone
>
>> On Dec 15, 2014, at 7:35 PM, "Jeff Fuhrman" <jfuhrman@llbhpwm.com> wrote:
>>
>> Gents -
>>
>> Greetings from Las Vegas!
>>
>> As promised in our last Executive Committee meeting, I'm attaching for your review a draft version of the new and improved Partner Wealth Management, LLC Operating Agreement.
>>
>> I've asked Dave Lagasse from Mintz Levin, the person who helped me draft this document, to come to our office on Thursday to walk through and explain the contents. Of course, if you have any questions of me in advance, I'm happy to address them.
>>
>> As you know, we've been talking about this for over a year now with the hope of getting something executed for the start of 2015. I'm optimistic Santa will be good to us this year and look forward to Thursday's discussion.
>>
>> Thanks.
>>
>> Jeff
>> <PWM -- Amended and Restated LLC Operating Agreement.DOCX>

From: Kevin Burns [kburns@llbhpwm.com]
Sent: Friday, December 19, 2014 12:26 PM
To: Lagasse, David; Bill Loftus; Jim Pratt-Heaney; Bill Lomas
Cc: Jeff Fuhrman
Subject: RE: Revised Amended and Restated Operating Agreement
Attachments: image001.jpg

Thanks David. It's nice to see the end in sight as this has been a long drawn out process.

Kevin G. Burns
Founding Partner

LLBH Private Wealth Management LLC
33 Riverside Avenue 5th Floor
Westport, CT 06880
Direct: 203-683-1525
Cell: 203-247-9054
www.LLBHprivatewealthmanagement.com

From: Lagasse, David [mailto:DLagasse@mintz.com]
Sent: Friday, December 19, 2014 9:43 AM
To: Bill Loftus; Jim Pratt-Heaney; Kevin Burns; Bill Lomas
Cc: Jeff Fuhrman
Subject: Revised Amended and Restated Operating Agreement

It was a pleasure to meet and work with you yesterday. As we discussed, attached is a revised draft of the operating agreements incorporating the changes we discussed yesterday.

Section 4.2 is amended to provide that in the event of any deadlock vote on the Management Committee, the matter will be referred to the Members for a vote.

Section 4.3 is amended to provide that there will be no fewer than three and no more than five members of the Management Committee (as determined annually by vote of the Members).

Section 6.2(c) is amended to provide that the Founding Partners (now defined in the Preamble as the four of you) will retire (by selling out your Base Interest) as of the age of 75.

Section 6.2(c)(iv) is amended to provide a 30 day cure period for negligence in performance.

Section 7.2 is amended to permit transfers to irrevocable and other types of trusts for estate planning purposes.

Section 7.5(a) is amended to provide that the Valuation Period for a Founding Partner's Base Interest in commencement with retirement is the year in which the Member attains 71 years of age.

Section 7.5(b)(ii) is amended to provide that the revaluation of a sale of a Performance Interest will be done on the 18 month anniversary of the end of the original Valuation Period, to provide that no reduction will be made if the valuation has

not declined by more than 10% and that the purchase price adjustment will be 90% of the original purchase price less the revalued purchase price.

Section 7.6(a) is amended to provide 120 days for closing the purchase of a Member's Interest.

Section 7.6(e) is amended to provide that in the event of a Member's death, the deceased Member's Performance Interest will not be subject to revaluation following the 18 month anniversary of the original Valuation Period.

I think the only remaining issue we discussed was whether under Section 7.6(e) (i) a Member's estate would keep any life insurance proceeds received in excess of the purchase price for the Member's Interest and therefore each Member would bear the cost of his own annual insurance premiums under Section 5.2(c) or (ii) the partnership would retain any excess life insurance proceeds and the Member's would pay insurance premiums on an aggregate and prorate basis. I have left the language in the operating agreement to reflect (i) at the moment. I believe Jim wanted to see some numbers on costs on this point. If you would like me to change the language to option (ii), let me know. It is a quick change.

The redline attached is marked against the draft we reviewed yesterday.

Best,

Dave

David Lagasse | Member
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
666 Third Avenue | New York, NY 10017
Direct: +1.212.692.6743 | Fax: +1.212.983.3115
E-mail: DLagasse@mintz.com
Web: www.mintz.com

From: Lagasse, David [DLagasse@mintz.com]
Sent: Tuesday, December 23, 2014 11:58 AM
To: Bill Loftus; Jim Pratt-Heaney; Kevin Burns; Bill Lomas
Cc: Jeff Fuhrman
Subject: RE: Revised Amended and Restated Operating Agreement
Attachments: Redline -- PWM -- Amended and Restated LLC Operating Agreement.DOCX; PWM -- Amended and Restated LLC Operating Agreement (3).DOCX

Jeff passed on the changes to the LLC operating agreement to address insurance. The revised agreement is attached and the redline is marked against the draft I sent out last Friday.

The changes were to include in a new Section 2.5 that requires all members to have a minimum of $3 million in life insurance (subject to the management committee requiring more insurance) and a change in Section 5.2(c) to provide that the cost of the first $3 million in insurance will be paid by the members based on their Base Interest pro rata holdings (so 25% each at the moment).

Please let me know if you have any further comments.

Best and Happy Holidays,

Dave

David Lagasse | Member
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
666 Third Avenue | New York, NY 10017
Direct: +1.212.692.6743 | Fax: +1.212.983.3115
E-mail: DLagasse@mintz.com
Web: www.mintz.com

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

From: Lagasse, David
Sent: Friday, December 19, 2014 9:43 AM
To: Bill Loftus; Jim Pratt-Heaney; Kevin Burns; Bill Lomas
Cc: 'Jeff Fuhrman'
Subject: Revised Amended and Restated Operating Agreement

It was a pleasure to meet and work with you yesterday. As we discussed, attached is a revised draft of the operating agreements incorporating the changes we discussed yesterday.

Section 4.2 is amended to provide that in the event of any deadlock vote on the Management Committee, the matter will be referred to the Members for a vote.

Section 4.3 is amended to provide that there will be no fewer than three and no more than five members of the Management Committee (as determined annually by vote of the Members).

Section 6.2(c) is amended to provide that the Founding Partners (now defined in the Preamble as the four of you) will retire (by selling out your Base Interest) as of the age of 75.

Section 6.2(c)(iv) is amended to provide a 30 day cure period for negligence in performance.

Section 7.2 is amended to permit transfers to irrevocable and other types of trusts for estate planning purposes.

Section 7.5(a) is amended to provide that the Valuation Period for a Founding Partner's Base Interest in commencement with retirement is the year in which the Member attains 71 years of age.

Section 7.5(b)(ii) is amended to provide that the revaluation of a sale of a Performance Interest will be done on the 18 month anniversary of the end of the original Valuation Period, to provide that no reduction will be made if the valuation has not declined by more than 10% and that the purchase price adjustment will be 90% of the original purchase price less the revalued purchase price.

Section 7.6(a) is amended to provide 120 days for closing the purchase of a Member's Interest.

Section 7.6(e) is amended to provide that in the event of a Member's death, the deceased Member's Performance Interest will not be subject to revaluation following the 18 month anniversary of the original Valuation Period.

I think the only remaining issue we discussed was whether under Section 7.6(e) (i) a Member's estate would keep any life insurance proceeds received in excess of the purchase price for the Member's Interest and therefore each Member would bear the cost of his own annual insurance premiums under Section 5.2(c) or (ii) the partnership would retain any excess life insurance proceeds and the Member's would pay insurance premiums on an aggregate and prorate basis. I have left the language in the operating agreement to reflect (i) at the moment. I believe Jim wanted to see some numbers on costs on this point. If you would like me to change the language to option (ii), let me know. It is a quick change.

The redline attached is marked against the draft we reviewed yesterday.

Best,

Dave

David Lagasse | Member
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
666 Third Avenue | New York, NY 10017
Direct: +1.212.692.6743 | Fax: +1.212.983.3115
E-mail: DLagasse@mintz.com
Web: www.mintz.com

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

EXHIBIT D

From: Jeff Fuhrman [jfuhrman@llbhpwm.com]
Sent: Monday, November 10, 2014 12:05 PM
To: Dave Lagasse
Subject: Partnership Agreement
Attachments: LLBH Operating Agreement Considerations.PPT; Management Company Operating Agt Template (00008701).doc; PWM LLC Company Agreement.pdf; #5171778v16_DMS_ - BAM Management LLC Amended and Restated Operating Agr....doc

Hi Dave.

Attached for your review are a few items as follows:

- PWM LLC Company Agreement – Our existing partnership agreement.
- LLBH Operating Agreement Considerations – The PPT I prepared for the partners delineating all the issues as I perceived them.
- Management Company Operating Agt Template – The template Focus provided me over a year ago that they offer most of their new firms. This one looks eerily similar to our existing version.
- BAM Management LLC Amended and Restated Operating Agreement – This is agreement used by one of the premiere Focus firms. Never mind that employees of the operating company can also be shareholders of the management company.

Happy to discuss at your convenience.

Thanks.

Jeffrey M. Fuhrman
Chief Operating Officer and Chief Financial Officer
LLBH Private Wealth Management LLC
33 Riverside Ave. - 5th Floor
Westport, CT 06880
PH: 203-987-3165
Cell: 917-696-6110
Fax: 888-778-3892
www.llbhprivatewealthmanagement.com

From: Lagasse, David [DLagasse@mintz.com]
Sent: Thursday, December 11, 2014 3:04 PM
To: Jeff Fuhrman; Jeff Fuhrman
Subject: Amended and Restated Operating Agreement
Attachments: Redline -- PWM LLC Operating Agreement (Restated v. Original).DOCX; PWM -- Amended and Restated LLC Operating Agreement.DOCX

Hi Jeff,

The amended and restated operating agreement is attached incorporating the changes we discussed. Also attached is a redline marked against the current operating agreement, although given the scope of the changes, I am not sure how helpful it will be. After you have a chance to review, let's set up a time to discuss any comments or questions you may have.

Best,

Dave

David Lagasse | Member
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
666 Third Avenue | New York, NY 10017
Direct: +1.212.692.6743 | Fax: +1.212.983.3115
E-mail: DLagasse@mintz.com
Web: www.mintz.com

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

From: Jeff Fuhrman [jfuhrman@llbhpwm.com]
Sent: Tuesday, December 23, 2014 10:57 AM
To: Lagasse, David
Subject: RE: Buy/Sell Insurance

No comments from me. If you could distribute, that would be great.

At this point, what do we need to do to wrap this up? Do you need the exhibits from me? Is there some formality to the vote?

From: Lagasse, David [mailto:DLagasse@mintz.com]
Sent: Monday, December 22, 2014 3:28 PM
To: Jeff Fuhrman
Subject: RE: Buy/Sell Insurance

Hi Jeff,

The revised LLC operating agreement is attached with this change. Let me know if you have any comments or whether you would like to send the revised version to the members.

Dave

David Lagasse | Member
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
666 Third Avenue | New York, NY 10017
Direct: +1.212.692.6743 | Fax: +1.212.983.3115
E-mail: DLagasse@mintz.com
Web: www.mintz.com

MINTZ LEVIN
Mintz Levin Cohn Ferris Glovsky and Popeo PC

From: Jeff Fuhrman [mailto:jfuhrman@llbhpwm.com]
Sent: Monday, December 22, 2014 11:57 AM
To: Lagasse, David
Subject: FW: Buy/Sell Insurance

FYI...

From: Jim Pratt-Heaney
Sent: Monday, December 22, 2014 11:46 AM
To: Jeff Fuhrman; Bill Loftus; Kevin Burns
Subject: RE: Buy/Sell Insurance

That is what I would like and then agreement should be done
Thanks
jim

Jim Pratt-Heaney, CIMA ®
Founding Partner

LLBH Group Private Wealth Management LLC
33 Riverside Avenue 5th Floor
Westport, CT 06880
800-700-LLBH (5524)
Direct 203-683-1527
www.LLBHprivatewealthmanagement.com

From: Jeff Fuhrman
Sent: Monday, December 22, 2014 11:18 AM
To: Jim Pratt-Heaney; Bill Loftus; Kevin Burns
Subject: RE: Buy/Sell Insurance

I think this is what you're saying, but we could have the first $3 million of buy/sell insurance as a shared cost and everything above that purchased by the individual.

My admittedly ex post facto logic is as follows:

1) our base is roughly $3 million and a basic threshold amount for each of you (ie, this is in a way a "founders' exception" as everyone who comes in after will help offset this initial amount);

2) we've passed the $3 million valuation mark for each of you anyway, so we don't have the issue of excess insurance reverting to the company;

3) it's already set up this way, so leave well enough alone; and

4) I'm optimistic that whatever "new" insurance we purchase will be portable in which case it makes sense that everyone pays for themselves and keeps any excess.

This is a little quirky to draft, but perhaps the idea could be that every partner is required to participate with the purchase of a minimum of $3 million of life irrespective of their ownership level. The quid pro quo could be that any excess insurance reverts to the heirs of the deceased.

Let me know what you think.

From: Jim Pratt-Heaney
Sent: Monday, December 22, 2014 9:16 AM
To: Jeff Fuhrman; Bill Loftus; Kevin Burns
Subject: RE: Buy/Sell Insurance

Guys,

As Bill said this is really your call. I would like to continue sharing the current insurance, since that is what is in place, and clearly would be a big cost increase for me to take , which I rather not do at this time. Clearly a selfish request, but seems to make sense for the current.

I also understand Jeff's point so maybe we each pay the new insurance ourselves and call the old our favorite " founder's exception". Todd is my agent so I will talk to him too, but 36m seems insane to me, I hope there is a better way.

Thanks
Jim

Jim Pratt-Heaney, CIMA ®
Founding Partner

LLBH Group Private Wealth Management LLC
33 Riverside Avenue 5th Floor
Westport, CT 06880
800-700-LLBH (5524)
Direct 203-683-1527
www.LLBHprivatewealthmanagement.com

From: Jeff Fuhrman
Sent: Friday, December 19, 2014 4:44 PM
To: Jim Pratt-Heaney; Bill Loftus; Kevin Burns
Subject: Buy/Sell Insurance

Following up on yesterday's discussion, I was finally able to track down the spreadsheet (hard, not soft copy) I had prepared re: your buy/sell life insurance policies.

For $3 million of coverage, your annual policy premiums are roughly as follows:

KGB - $9K
WAL - $9K
WPL - $7K
JPH - $27K (note the different carrier and term end)

However, you've been sharing in these costs to the tune of roughly $13K each per annum.

You'll also note that I had priced out an additional $4 million for each of you. If for no other reason than three of you will be increasing your positions, there clearly is a need. Given that this analysis was done a year ago, it's likely these figures have increased, nevertheless the premiums previously provided are as follows:

KGB - $14K
WPL - $9K
JPH - $36K

The blended effect on the three of you for both policies would be roughly $34K.

The point I was trying to make is that this shows disparities when everyone is insuring to the same level. My concern is when new folks come in who don't need $7 million of coverage, it will only exacerbate these discrepancies and engender acrimony. Better to allow people to pay their own share AND keep it themselves.

As I mentioned, the greater travesty is that you're paying these fees in on a post-tax basis and will likely exit the business without ever receiving any benefit from them (ie, we hope you won't die). I wouldn't recommend purchasing new policies until we sorted this out with Todd/Tom as we're developing a solution with them.

In any case, let me know if you have any questions.

Jeffrey M. Fuhrman
Chief Operating Officer and Chief Financial Officer
LLBH Private Wealth Management LLC
33 Riverside Ave. - 5th Floor
Westport, CT 06880
PH: 203-987-3165
Cell: 917-696-6110
Fax: 888-778-3892
www.llbhprivatewealthmanagement.com

From: Jeffrey Fuhrman [jfuhrman@llbhpwm.com]
Sent: Friday, July 17, 2015 1:58 PM
To: Lagasse, David
Subject: FW: as discussed with KB - Confidential
Attachments: 298C480C-3F2B-46FB-AABA-20F28B6395A1[114].png; FEC300AB-4B03-4D0C-8A2E-0DEE97B22ED2.jpg

Let's discuss...

From: Kevin Burns
Sent: Friday, July 17, 2015 1:33 PM
To: Jeffrey Fuhrman
Subject: FW: as discussed with KB - Confidential

From: Rajini Kodialam [mailto:rkodialam@ffpar.com]
Sent: Friday, July 17, 2015 12:51 PM
To: Kevin Burns; Kevin Burns; Bill Loftus
Subject: as discussed with KB - Confidential

Bill Lomas ask		$ 3,500,000
Less Earn Out	$ 900,000	$ 2,600,000
Less available	$ 400,000	$ 2,200,000
Adjusted to compensate for Ordinary at 40% vs Cap Gains at 25%	KB thinks not needed	$ 2,750,000
Focus pays MC to acquire incremental EBITDA at 7x		$ 2,750,000
Acquired EBITDA		$ 392,857
If we ignore tax difference, then acquired EBITDA at same 7x multiple		$ 314,286

This is an annual increase to Focus EBITDA and a commensurate decrease to Mgmt Fees.
We will not change % split above target.
all 3 principals sign Mgmt agreement term for 7 years.(term = multiple)

Rajini Kodialam
Focus Financial Partners, LLC
USA: 1-646-216-8591
Australia: 61-38 400 4095
www.FocusFinancialPartners.com

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~~~~~~~

From: Jeff Fuhrman [jfuhrman@llbhpwm.com]
Sent: Friday, January 02, 2015 4:41 PM
To: Bill Loftus; Kevin Burns; Jim Pratt-Heaney
Cc: Dave Lagasse
Subject: FW: RE: CONFIDENTIAL
Attachments: image003.jpg; Robison for William Alan Lomas 3mm face 5 pay S10 max income.pdf; Lomas PWM Buyout -- Executive Group Term Carve Out REVISED 1.2.15.pdf

Gents –

Just to let you know, Todd, Tom and I just had a call to further discuss a conversion of his buy/sell policy. I've attached their summary and the actual illustration for your reference.

To summarize the summary, here's how it works:

- We convert WAL's $3 million policy from company-owned to joint ownership.
- This policy is further enhanced because he's able to upgrade from a standard to preferred status without any medical exam.
- For a period of 5 years, PWM would pay 90% of the annual premium or roughly $170K/year in pre-tax dollars; this would save WAL over $260K in taxes.
- WAL would pay roughly $20K/year for 5 years in after-tax dollars.
- By the time WAL is 68, he'll be able to take out over $100K per year TAX FREE.
- Additionally, his insurance policy will peak at $3.2 million (at age 62) and a low of $670K (at age 85).

While this doesn't get us all the way home, it can form a portion of the buyout in a tax efficient way both for WAL and you all. In fact, it's hard to imagine WAL would be able to replicate these after-tax returns. Frankly, this is such a good deal, I would strongly advocate we contemplate this as a part of any partners' buy out consideration.

In any case, look forward to discussing at your convenience.

Thanks.

From: Todd Robison [mailto:Todd.Robison@cedarpointfinancial.com]
Sent: Friday, January 02, 2015 4:03 PM
To: Jeff Fuhrman
Cc: Thomas V. Barnes (tom@brightonconsulting.net); Deyanne Whitters
Subject: RE: RE: CONFIDENTIAL

Jeff—revisions as we discussed. Let's catch up next week.

Have a great weekend in the meantime, Todd

Hi Jeff—happy new year.

Are you around today or early next week to discuss the attached?

Please let us know what works and I'll send an invite accordingly.

Thanks,

Todd N. Robison, CLU®, President
Cedar Point Financial Services LLC®
10 Wright Street, 2nd Floor, Westport, CT 06880
203.222.4951 office 203.222.4962 fax
todd.robison@cedarpointfinancial.com

From: Jeff Fuhrman [mailto:jfuhrman@llbhpwm.com]
Sent: Saturday, December 20, 2014 5:02 PM
To: Bill Loftus
Cc: Kevin Burns; Jim Pratt-Heaney; Todd Robison; Thomas V. Barnes
Subject: RE:

1. I suppose this would be a source of debate, but I'd say $2.3 million in cash.

2.It's $200K per annum for 5 years which would compound (i.e., $50K+-dividend by year 5).

3. Yes, but I understand it to be $1 million.

Sent via the Samsung GALAXY S®4, an AT&T 4G LTE smartphone

-------- Original message --------
From: Bill Loftus <bloftus@llbhpwm.com>
Date:12/20/2014 4:26 PM (GMT-05:00)
To: Jeff Fuhrman <jfuhrman@llbhpwm.com>
Cc: Kevin Burns <kburns@llbhpwm.com>, Jim Pratt-Heaney <jpratt-heaney@llbhpwm.com>, Todd Robison <Todd.Robison@cedarpointfinancial.com>, "Thomas V. Barnes" <tom@brightonconsulting.net>
Subject: Re:

So in essence .,,,
1. He gets $3 million in cash
2. He receives a 5 percent dividend over the next 5 years which equates to $10,000 per year that allows him to keep the $3 million policy
3. He still gets the $200,000. As well right?
So all we are. Doing is funding his insurance?

Bill

Sent from my iPhone

> On Dec 20, 2014, at 1:41 PM, Jeff Fuhrman <jfuhrman@llbhpwm.com> wrote:
>
> This is an insurance policy, not cash. For a portion of our consideration, we pay less, he gets more (when he dies). No brainier.
>
> Sent from my iPad
>
>> On Dec 20, 2014, at 1:36 PM, Kevin Burns <kburns@llbhpwm.com> wrote:
>>
>> I guess I'm losing my mind because if you think there is a chance we pay him more than the 3.3 million I'd rather pay him nothing and let him sue us forever on his dime. So if this is in lieu of part of the 3.3 then I would consider it. If you are speaking In addition to then zero chance.
>>
>> Sent from my iPad
>>
>>> On Dec 20, 2014, at 1:27 PM, Jeff Fuhrman <jfuhrman@llbhpwm.com> wrote:
>>>
>>> Last night, I spoke with Todd and Tom (copied here) regarding your buy/sell policies. They're up to date on our new agreement and the insurance requirements we'll have moving forward. We'll continue to work on a solution to the various challenges you're all aware of.
>>>
>>> I also brought them up to speed with the WAL withdrawal. They pointed out that with the $3 million MetLife policy he currently has in force we have the ability to convert the ownership/beneficiary without any need for an exam. The idea here is that Partner Wealth Management could make a PRE-TAX premium payment of $200K per annum for five years for which he would receive a 5% coupon compounded annually and growing TAX-FREE. So, in addition to the $3 million, he would receive this incremental amount which could be passed to his heirs TAX-FREE.
>>>
>>> I can't pretend to know his financial circumstances, but what I do understand is that he is quite frugal and doesn't necessarily need the cash flow. If so, this should certainly form a part of our offer as it's good for us and good for him.
>>>
>>> Please let me know if you have any questions.
>>>
>>> Thanks.
>>>
>>> Sent from my iPad

EXHIBIT E

SUPERIOR COURT OF THE STATE OF CONNECTICUT
JUDICIAL DISTRICT OF STAMFORD/NORWALK
DOCKET NO. FST-CV-15-5014808-S

WILLIAM A. LOMAS,

Plaintiff,

VS.

PARTNER WEALTH MANAGEMENT, LLC, KEVIN G. BURNS, JAMES PRATT-HEANEY, WILLIAM P. LOFTUS,

Defendants.

C O N F I D E N T I A L

D E P O S I T I O N

The Deposition of JEFFREY M. FUHRMAN, taken on behalf of the Plaintiff in the hereinbefore entitled action, before Francine Garb, a Certified Shorthand Reporter and Notary Public within and for the State of Connecticut, commencing at 10:04 a.m., on August 26, 2016, at the offices of McCarter & English, LLP, 201 Broad Street, Stamford, Connecticut.

COURT REPORTER: FRANCINE GARB, CSR
LICENSE # 139

A Yes.
Q Is it fair to say based upon the answer that you gave a moment ago, that you were the primary draftsperson?
A Yes. It had been drafted before, so that is -- yes.
Q In other words, it had been drafted by someone else for a different company, you used it as your model?
A I was involved in the prior drafting, so, yes.
Q So what company was that from?
A IMG Artists.
Q Was David Lagasse involved in the drafting of it for IMG?
A I don't recall to be honest.
Q Was Dave Lagasse counsel to IMG?
A He did some work for IMG, yes.
Q Now, you were responsible for Mr. Lagasse's role in connection with the dispute -- well, withdrawn.
You were responsible for Mr. Lagasse's role in connection with work that he did for Partner Wealth Management, correct?
MR. ALTABET: Objection.

A What do you mean by "responsible for"?
Q Well, were you the relationship person?
MR. ALTABET: Objection.
A That's fair to say.
Q Did he have any other point of contact at Partner Wealth Management or LLBH before your arrival that you know of?
A Not that I know of, no.
Q I believe Mr. Pratt-Heaney testified yesterday that he understood the employee handbook to be a work in process.
Your testimony is otherwise, it's completed?
A It is.
Q And if asked to be produced, you could produce that, right?
A Yes.
Q And is a copy issued to every employee?
A Yes.
Q Is a copy issued to every partner, member of Partner Wealth Management?
A Well, if Mr. Pratt-Heaney says it's a work in progress, I would assume not. I don't recall. I know we would have distributed it to every employee and had their signature.

Agreement. To suggest that somehow that was thrust upon us in this e-mail is absurd.

Q When was the first time there was a new draft of that Operating Agreement?

MR. ALTABET: Objection.

A I don't know.

Q It didn't exist as of these e-mails that we're looking at in Plaintiff's Exhibit 70, right?

MR. ALTABET: Objection.

A I don't know.

Q Do you know when you first hired David Lagasse to work on the revised LLC agreement?

MR. ALTABET: Objection.

A Yes. Coterminous with the decision to hire for the compensation agreement, they were the same matter. It was adjusting the 2009 agreement, which we all agreed was flawed.

Q Was there an engagement letter with Mintz Levin at that time?

A I'm pretty sure there was.

Didn't we do that as part of the pro hac vice thing?

Q You may have.

But you don't know when he first started drafting the buyout provision?

MR. ALTABET: Objection.

A The decision -- the work that was being done was attempted to be done through our Management Committee. So we were working -- every month, I was convening the team to work on ideas and get consensus.

Q How is that responsive to my question, which is, you don't know when Mr. Lagasse first started drafting the buyout provision?

A I would say it was in and around this time.

Q Right around October?

A I don't know if it was October, November. It was when I said let's get a draft, because I wanted to now at this point, finalize it. We had been discussing it for a long time. We had decided that we would use as the bones of the document something similar to the 2009 agreement.

It would insert the new compensation amendment and effect all the other changes, which was one of the bigger elements, change the compensation, which we had already agreed, and then change the valuation. It was easy to do that. I had worked with Mr. Lagasse for years. I

trusted him.

Q In any event, Mr. Lagasse didn't start drafting until sometime after Mr. Lomas tendered his withdrawal, right?

MR. ALTABET: Objection.

A What difference does it make?

Q You have to answer my question. You don't get to answer a question with a question.

A I don't know when he started drafting.

Q I'm showing you Plaintiff's Exhibit 71.

(12/8/13 e-mail bearing Bates No. PWM_0000869 marked Plaintiff's Exhibit 71 for identification.)

BY MR. RECHEN:

Q Do you recognize this as an e-mail from you to each of the four members in December of 2013?

A Yes. I'm sure, yes. Yes, I wrote that. Is that your question?

Q Do you recall this?

A Vaguely, yes.

Q In the second paragraph, you -- second to last sentence, you say, "So instead, I have now reached out to a lawyer I used for such matters while I was at IMG Artists and before at Gemini

Q Mr. Fuhrman, Attorney Lagasse had been involved in redrafting an amendment -- withdrawn.

Mr. Lagasse -- Attorney Lagasse had been involved in drafting an amendment to the 2009 agreement that addressed compensation, correct?

A Correct.

Q Is it fair to say that prior to this time, he had not begun drafting an amendment that -- or for that matter, a new agreement that was going to address the buyout valuation?

MR. ALTABET: Objection.

A At that point in time, I don't know. My guess -- I don't know.

Q Does it appear to you, based on his e-mail, that this represents a starting point in terms of his -- at least his drafting?

MR. ALTABET: Objection.

A Inasmuch as the directive was that we use the PWM, LLC agreement of 2009 as the basic template, yes.

Q Mr. Fuhrman, I'm showing you what has been marked as Plaintiff's Exhibit 76.

(10/2014 e-mail chain with attachment bearing Bates Nos. PWM_0000082 through 84 marked Plaintiff's Exhibit 76 for